Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 59.

THE TEXAS CENTRAL RAILWAY COMPANY,
Appellant.

vs.

MORGAN'S LOUISIANA and TEXAS RAILROAD and
STEAMSHIP COMPANY, THE FARMERS' LOAN
AND TRUST COMPANY, Trustee, and THE
METROPOLITAN TRUST COMPANY,
Trustee, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE
UNITED STATES FOR THE NORTHERN
DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

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APPELLANT,

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MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, AND THE METROPOLITAN TRUST COMPANY, TRUSTEE.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Brief for the Appellant.

STATEMENT OF THE CASE.

This is the separate appeal of the Texas Central Railway Company from the final decree of foreclosure and sale rendered by the Court below, on April 12, 1887, upon the bill filed by the Farmers' Loan and Trust Company, as a so-called cross-bill, in the suit instituted by Morgan's Louisiana and Texas Railroad and Steamship Company against the appellant and other parties, which is before this Court in **No. 55,** praying for the foreclosure of the two mortgage deeds of trust, of the respective dates of September 15, 1879, and May 16, 1881, upon the railroad of the appellant, a sale of the mortgaged property, and the application of the proceeds to the payment of its costs, expenses and compensation, as trustee, and in discharge of the bonds and coupons secured by the mortgages, and a personal judgment against the appellant for any deficiency.

The case, disclosed by the record, which is stated in the Brief for Appellant in **No. 55,** is mainly as follows:

The appellant, a corporation under the laws of the State of Texas, and a citizen of that State, was originally organized, in 1879, to construct and operate a line of railway from Ross Station, in McLennan county, to or near the centre of Eastland county, a distance of about 130 miles, or more.

Under an amendment of its charter, in 1881, the Company was authorized to extend its railway from its then terminus near the centre of Eastland county (the latter point being marked by the town of Cisco) to a point on the north boundary line of Texas, a distance of about 375 miles, and, also, to construct certain branch railroads.

The appellant has constructed and owns, under its charter, the following-described railways, in the State of Texas, aggregating about 227 miles, viz.:

A line from Ross Station to Albany, at or near the centre of Shackelford county, a distance of about 176 miles; and, also—

A line from Garrett, in Ellis county, to Roberts, in Hunt county, a distance of about 52 miles. (Record, pp. 2, 74.)

On September 15, 1879, the Texas Central Railway Company executed to the Farmers' Loan and Trust Company, a corporation under the laws of New York, and a citizen of that State, as trustee, a mortgage covering its railway, built and to be built, from Ross Station to the centre of Eastland county, a distance of about 130 miles, to secure a series of coupon bonds of one thousand dollars each, at the rate of fifteen thousand dollars for each mile of road, payable thirty years after November 1, 1879, with interest at seven per cent. per annum, payable on the first days of May and November in each year. (Mortgage, Rec., pp. 84–89.)

The bonds issued under this mortgage are designated as the bonds of 1909.

On May 16, 1881, the Texas Central Railway Company executed to the same Company, as trustee, another mortgage to secure the payment of a second series of coupon bonds of one thousand dollars each, at the rate of fifteen thousand dollars to each mile of completed road, payable May 1, 1911, with interest at seven per cent. per annum, payable semi-annually on the first days of May and November, in each year, which mortgage covered its entire main line of railway, built and to be built, from Ross Station to a point mentioned on the northern boundary line of the State, a distance of about 375 miles, and, also, certain branch lines, built and to be built, described in the instrument. (Mortgage, Rec., pp. 91–98.)

The bonds issued under this mortgage are designated as the bonds of 1911.

These mortgage deeds of trust, respectively, provide that in case the mortgagor shall fail to pay the principal or any of the interest on any of the bonds at the time when the same may become due and payable, according to the tenor thereof, and if the default shall continue sixty days after having been demanded, then and thereupon the principal of all of the bonds shall be and become immediately due and payable, and upon the request of the holder or holders of seventy-five (75) per cent. of the bonds then outstanding, and written notice of such request being served on the New York agency of the mortgagor, at which the bonds and coupons are made payable, the said trustee or its successor may and shall take actual possession (with or without entry or foreclosure) of the railway, and of the other mortgaged property, and shall manage and operate the same, first defraying out of the same the expenses, and the surplus to pay the interest and principal of all the bonds due and outstanding *pro rata*; and that upon the request of the holder or holders of seventy-five (75) per cent. in amount of the bonds so in default, which may be at any time outstanding under the deed of trust, it shall be the duty of the said trustee, by its president or agent duly appointed in its behalf, to foreclose the mortgage and sell the property, at the city of Houston, Texas, at public auction, to the highest bidder, etc. (Rec., pp. 85, 86; also, pp. 93, 94.)

On October 1, 1884, the appellant made, executed, and delivered another mortgage deed of trust to the Metropolitan Trust Company of the City of New York, a corporation organized under the laws of the State of New York, and a citizen of that State, by which it conveyed to the said trustee, in trust, all its property of every sort, kind, and description, to secure a series of bonds to be known as general mortgage bonds. (Mortgage, October 1, 1884, to the Metropolitan Trust Company, Rec., pp. 31–41.)

It appears that the Railway Company signed and sealed all the bonds authorized by the mortgage to the Metropolitan Trust Company, (being 2,286 bonds of one thousand dollars each,) but the trustee refused to certify them until the mortgage should be recorded in each county into which the railroad was projected and authorized by its charter. While the mortgage was undergoing recording, the appellant, on or about November 1, 1884, in settlement of its indebtedness to the Houston and

Texas Central Railway for moneys theretofore advanced in and about the operation of the road, amounting, with interest, to $761,992.04, executed and delivered to that Company certain promissory notes, and for the security of each of the notes pledged a number of the general mortgage bonds, amounting in all to $2,286,000. In order to make a pledge of the bonds, which were not yet certified by the trustee, the appellant issued and delivered to the Houston and Texas Central Railway Company its certificates or obligations in lieu of such bonds, obligating itself to deliver the bonds when certified by the trustee. The notes, and certificates for bonds, were pledged by the Houston and Texas Central Railway Company to Morgan's Louisiana and Texas Railroad and Steamship Company, as part security for a large debt due by it to the last-named Company. (Rec., pp. 7, 105; 117, fol. 215; 191, 192.)

Morgan's Louisiana and Texas Railroad and Steamship Company is a corporation organized under the laws of the State of Louisiana, and a citizen of that State.

On April 2, 1885, that Company filed, in the Court below, a bill in chancery against the appellant, as a citizen of the State of Texas, claiming, by virtue of the transactions above referred to, an equitable mortgage and lien upon the railroad of the appellant, to the amount of $761,992.04, and praying, *inter alia*, the appointment of receivers to take possession of and manage the property, and the payment and satisfaction of its claim out of the revenues coming into the hands of the receivers.

On the 6th of April, 1885, such receivers were appointed by the Court. (Bill, Rec., pp. 1–12.)

On May 14, 1885, the Morgan Company filed, in the Court below, an amended and supplemental bill against the appellant, and, also, the Farmers' Loan and Trust

Company, trustee, a citizen of the State of New York, and the Metropolitan Trust Company of the City of New York, trustee, also a citizen of the State of New York, re-averring the matters alleged in the original bill, and alleging other matters, as ground for the relief therein prayed. (Rec., pp. 49, 50.)

The material contents of these bills are fully stated in the Brief for the Appellant in **No. 55** (Brief, pp. 3–6).

The bills were answered by the defendants; by the appellant, the Texas Central Railway Company, on April 2, 1885 (Rec., pp. 53–57); by the Metropolitan Trust Company of the City of New York, August 17, 1885 (*Ib.*, pp. 59, 60); and by the Farmers' Loan and Trust Company, September 24, 1885 (*Ib.*, pp. 62–68).

The Morgan Company filed, on November 2, 1885, its replications to the answers of the Farmers' Loan and Trust Company and the Metropolitan Trust Company (Rec., pp. 69, 70).

On July 3, 1886, the Farmers' Loan and Trust Company, one of the defendants to the bill of the Morgan Company, as mentioned, filed, in the Court below, a petition, praying leave of the Court "to file its *cross-bill* for the *enforcement and foreclosure of the said mortgage securities*, making as defendants therein the complainant and its co-defendants," and stating as follows:

"The Farmers' Loan and Trust Company, a corporation under the laws of the State of New York, and a citizen of said State, respectfully represents that Morgan's Louisiana and Texas Steamship and Railroad Company brought its bill in the Circuit Court of the United States for the Northern District of Texas, against the Texas Central Railway Company, in which suit your petitioner and the Metropolitan Trust Company of New York are also defendants.

"Said suit is number 21 on the Equity Docket of said Court.

"All the defendants have made answer, but no evidence has been taken therein.

"The said complainant alleges your petitioner and the said Metropolitan Trust Company to be trustees in certain mortgages executed by the said Texas Central Railway Company, which fact is true, and the said complainant sues on certain notes alleged to have been executed by said Railway Company, claimed to have a prior lien on all the said railway and its property to the liens of said mortgages.

"That your petitioner has in its answer denied the existence of said prior lien, and default having been made on the said mortgage securities, your petitioner now prays leave to file its cross-bill *for the enforcement and foreclosure of said mortgage securities*, making as defendants therein the complainant and its co-defendants. Petitioner asks a proper order for leave to file said cross-bill, which is presented herewith." (Rec., pp. 71, 72.)

The record contains this entry:

"Leave is granted to file this bill. Graham July 1, 1886.

(Signed.) A. P. McCormick, Judge."

On July 3, 1886, the Farmers' Loan and Trust Company filed its bill of complaint, purporting to be filed as a cross-bill in this suit, with leave first had and obtained to file the same.

It is a bill, in the usual form, for the foreclosure of the mortgages of September 15, 1879, and May 16, 1881, and a sale of the property, against the Texas Central Railway Company, a citizen of Texas, and against the Metropolitan Trust Company of the City of New York, a corporation duly created by and under the laws of the State of New York, a citizen of said State, having its principal office and place of abode in the city of New York, and against Morgan's Louisiana and Texas Railroad and Steamship Company, a corporation duly created by and under the laws of the State of Louisiana, a citizen of said State, having its principal office and place of abode in the city of New Orleans," the said Morgan's Louisiana and Texas Railroad and Steamship Company being complainant, and the other parties above named being defendants, in a certain cause now pending in said Circuit Court of the United States, commenced by filing a bill of complaint on the 4th of April, 1885, and this present bill of complaint being filed as a cross-bill in said cause, leave to file the same having been first had and obtained." (Rec., p. 73.)

The prayer for relief is as follows:

"That your orator be placed in possession of the mortgaged premises personally, or that a receiver may be appointed in this cause of all and singular the rights, franchises, and property of every name and nature of the defendant, the Texas Central Railway Company, with power and authority to operate said railroad or railroads and to carry on all the business of the said Railway Company under the protection of this Court, with all the usual powers and duties of receivers and managers of railroads; that an injunction may issue out of this Court restraining and enjoining the Texas Central Railway Company and all and every its agents and servants from in any way interfering with the possession or control of said railroad under the control of said receiver, and from selling, transferring, conveying, leasing, or otherwise disposing of, or incumbering, any of the property, rights, or franchises of the Texas Central Railway Company; that an account be taken of the amount due, owing, and payable by the said defendant, the Texas Central Railway Company, to the lawful holders of the bonds and coupons secured by the said mortgages or deeds of trust, and each of them respectively so made to your orator as aforesaid, including the principal of each and all of the said outstanding bonds; that the amounts so found due on the bonds secured by the first mortgage or deed of trust may be adjudged to be a first lien on all the property and premises covered thereby; that the amounts found due on the bonds secured by the second-made mortgage or deed of trust may be adjudged to be a lien on all the property of the defendant Railway Company, subject only to the prior lien of the first-made mortgage as to the property covered thereby, and that this Court will order, adjudge, and decree that the defendant, the Texas Central Railway Company, shall, within a limited time, pay into court, for the use of the holders of such unpaid bonds and coupons, the amounts of principal and interest so found to be due and payable thereon, with interest on the same, together with the costs, expenses, and charges of this suit, and a reasonable and proper compensation to your orator in the performance of its trust; and should default be made in such payment, then that all the property and franchises of the said defendant, the Texas Central Railway Company, including the entire franchises, property, premises, and appurtenances belonging to it, described in, and affected by, the said mortgages or deeds of trust, should be sold to pay the said principal and interest, with the costs and expenses as aforesaid, and the proceeds of sale be applied, in the first instance, to the payment of all legal costs and expenses incurred by your orator in the performance and discharge of the duties of its said trust, and its own reasonable compensation, and, in the next place, to the payment of the bonds and coupons secured by the said mortgages or deeds of trust so made to your orator, as hereinbefore set forth, and that the surplus, if any there may be, may be applied in such manner and among such parties as may be just; that all the defendants in this suit may be barred of, and from, any equity of redemption of and in said property and franchises as against both of the said mortgages or deeds of trust, and that any deficiency may be entered in this cause as a judgment against the Texas Central Railway Company, and that your orator may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity." (Rec. p. 82.)

It will be observed that this so-called cross-bill contains no averment of any *request*, by the holder or holders of seventy-five (75) per cent. in amount of the bonds in default, made to the trustee, to foreclose the mortgages, or to institute proceedings for that purpose, and proceeds upon the assumption that the trustee had the right, at its option, and upon its own motion, without any request by the bondholders, to institute proceedings for the collection of the principal of the bonds, by foreclosure and sale, upon a default in the payment of any *interest* on the bonds, and the continuance of such default for sixty days after having been demanded.

Answers were filed by the defendants in the cross-bill.

The Texas Central Railway Company admitted, among other things, that it failed to pay the interest on its bonds, as alleged, and stated that under the bill filed by the Morgan Company, on May 14, 1885, its property was placed in the hands of receivers.

The Company submitted to the Court the questions of law involved in the suit of the Morgan Company for the enforcement of its claim as a lien prior in right to the said mortgages upon the railroad property. (Answer of Texas Central Railway Company, Rec., pp. 104–106.)

The Morgan Company, in its answer, reiterated the averments in its original and amended bills, claiming that it has a lien upon the property of the Texas Central Railway Company, and that, in any foreclosure proceedings, it was entitled to be paid out of the proceeds of sale, by preference over the mortgage creditors, the amount due to it from the appellant. (Answer of the Morgan Company, *Ib.*, pp. 107–109.)

The Metropolitan Trust Company of the City of New York admitted, *inter alia*, that the Texas Central Railway Company made and delivered to it the mortgage or deed of trust mentioned in the thirteenth paragraph of the bill, and alleged that no bonds had, to its knowledge or belief, been issued secured by the lien thereof. (Rec., pp. 110, 111.)

Upon these pleadings, proofs were taken by the respective complainants in the bills. (Testimony for the Farmers' Loan and Trust Company, Rec., pp. 180–184; Evidence for the Morgan Company, Rec., p. 114–145.)

The proof on the part of the cross-complainant failed to show a request by the holders of seventy-five per cent. in amount of the bonds, to the trustee, to foreclose the mortgages.

On April 11, 1887, the case was heard before Judge Pardee, presiding in the Circuit Court. (Rec., p. 186.)

On April 12, 1887, the Court rendered a final decree, in the cause, which, after finding the execution and delivery to the complainant, The Farmers' Loan and Trust Company, of the two mortgages of September 15, 1879, and May 16, 1881, respectively, sought to be foreclosed by the bill of that Company, and the bonds entitled to the benefit of the security of those mortgages respectively, finds that on or about the first day of October, 1884, the Texas Central Railway Company made and delivered a certain other mortgage or deed of trust to the defendant, The Metropolitan Trust Company of the City of New York, to secure a series of bonds to be issued and to be known as general mortgage bonds of said Railway Company, and that said Railway Company did, by said general mortgage, grant and convey to said Metropolitan Trust Company all the property theretofore conveyed to the Farmers' Loan and Trust Company by the above mortgages, or either of them, but that the rights, liens, and claims of the said Metropolitan Trust Company, and the beneficiaries under its trust, so far as the same exist, are, in all respects, subsequent, subsidiary, and junior to the rights and equities of the cross-complainant herein, as trustee under the mortgages, so made to the cross-complainant as aforesaid, and of the holders of the bonds to secure which the same were made respectively, both of the said mortgages to the cross-complainant being prior liens to the said general mortgage—the first as to the property therein described, and the second as to the entire property of the defendant Railway Company. (Sec. X, Rec., p. 190.)

The decree then finds that the general mortgage bonds provided to be issued under said mortgage to the Metropolitan Trust Company of the city of New York, were duly executed and signed by the defendant Railway Company, and delivered to the said Metropolitan Trust Company for the purpose of having the said Trust Company certify the same as provided in the said mortgage, etc., and that the complainant herein, Morgan's Louisiana and Texas Railroad and Steamship Company, has an equitable lien upon all the property of the Texas Central Railway Company to the amount of $761,992.04, with six per centum per annum interest thereon from November 1, 1884, until paid, said lien, however, being junior and subordinate, in all respects, to the liens growing out of the mortgage deeds of trust of September 15, 1879, and May 16, 1881, to the Farmers' Loan and Trust Company, cross-complainant herein, upon the property of the said Railway Company. (Sec. X, Rec., p. 192; sec. XIV, *Ib.*, p. 194.)

The decree further finds that the Railway Company failed to pay the coupons which matured May 1, 1885, and any coupon which matured afterwards, and that all the said coupon interest remains in default; that payment has been duly demanded, and such default has continued sixty days after such demand; and that "*therefore the principal of all the said bonds secured by the said deeds of trust and each and all of them (including both the bonds of 1909 and the bonds of 1911) is and has become immediately due and payable.*" (Sec. XI, Rec., p. 192.)

It then finds:

> "That by reason of the default of the said Texas Central Railway Company to pay the said *coupon interest due as aforesaid, and any of it*, and by reason of other matters and things hereinabove alleged, the conditions of the said mortgages and deeds of trust of September 15, 1879, and May 16, 1881, and of each of them, made by the Texas Central Railway Company to the Farmers' Loan and Trust Company, have been broken, and that the said mortgages and deeds of trust, and both of them, have become absolute, and that the trustee is entitled to a decree for the sale of all the said mortgaged property to satisfy the principal and interest of the said bonds secured by the said mortgages or deeds of trust respectively, and all of them." (Sec. XIII.)

It further adjudges that the defendant, the Texas Central Railway Company, shall, within ten (10) days from date, pay into court, for the use and benefit of the holders of the bonds and unpaid coupons secured by the said mortgages to the Farmers' Loan and Trust Company, the principal and interest of the bonds, amounting to the sum of $\$4{,}015{,}528\frac{98}{100}$, with interest thereon from the date of the decree at eight per cent. per annum, and also a sufficient sum to defray the costs of this cause.

And it is ordered, adjudged, and decreed that in default of such payment by the said Railway Company, or some one on its behalf, the equity of redemption of the defendant Railway Company, and of all the parties to this suit, and of all the holders of bonds or other claims issued under and secured by the said mortgage to the Metropolitan Trust Company of the City of New York, of, in, or to the mortgaged property, shall be barred and foreclosed, and that in default of such payment all the mortgaged premises and property shall be sold to the highest bidder for cash, as provided.

The decree requires the purchaser to pay, in cash, the costs of this suit to be taxed, and also the compensation of the Farmers' Loan and Trust Company for its services, charges and expenses in the execution of its trusts, respecting the mortgages, including its own compensation, and its disbursements, and allowances for solicitors' and counsel fees in the execution of its trusts respecting the mortgages, and for services in this cause. (Sec. XVIII, Rec., p. 196.)

It provides that after paying off the claims entitled to be first paid out of the proceeds of the sale in cash, as set forth, the remainder of the bid, at the sale, may be paid either in cash or in bonds, or over-due coupons belonging thereto, secured by the said mortgages to the Farmers' Loan and Trust Company, the said bonds and coupons to be received at such price or value as will be equivalent to the distributive amount that the holders would be entitled to receive in case the entire amount of the bid were paid in cash. (Sec. XVIII, Rec., p. 196.)

It further orders that in case the amount of the bid shall be more than sufficient to pay the sums and amounts set forth, the amount of such overplus shall be applied to the payment of the sums decreed to be due to Morgan's Louisiana and Texas Railroad and Steamship Company.

The decree also adjudges, that if the proceeds of the sale shall be insufficient to satisfy the sums adjudged in favor of the Farmers' Loan and Trust Company, and in favor of Morgan's Louisiana and Texas Railroad and Steamship Company, they shall have personal judgments and decrees against the Texas Central Railway Company for the balance that will remain due to them, respectively, over and above the proceeds of the sale, and shall have execution therefor. (Sec. XIX, Rec., p. 197.)

The Texas Central Railway Company has appealed from this decree.

Assignment of Errors.

The Court below erred:

1. In granting leave to the Farmers' Loan and Trust Company to file the bill of complaint for the foreclosure of the mortgages to that Company of September 15, 1879, and May 16, 1881, on the property of the appellant, presented with its petition filed July 3, 1886, and in entertaining the said bill, as a cross-bill, in the suit instituted by Morgan's Louisiana and Texas Railroad and Steamship Company against the appellant, the Farmers' Loan and Trust Company, and the Metropolitan Trust Company of the City of New York as defendants.

2. In rendering the decree of foreclosure and sale passed in the suit on April 12, 1887, in accordance with the prayers of the alleged cross-bill of the Farmers' Loan and Trust Company.

3. In not dismissing the said bill of complaint for want of jurisdiction to entertain the same, and grant the relief prayed in the bill.

4. In decreeing that the principal sums of the bonds secured by the said mortgages, respectively, have become due and payable in accordance with the terms of the mortgages.

5. In decreeing the foreclosure of the said mortgages and the sale of the property of the appellant, to satisfy the bonds secured by the mortgages, and all of them, the record not showing a request by the holders of seventy-five per cent. in amount of the said bonds outstanding under the mortgages to the said trustee, that it proceed to collect the principal and interest of the said bonds by foreclosure and sale of the said property.

6. In decreeing the foreclosure of the said mortgages and a sale of the mortgaged property, upon the non-payment of the full amount of the principal and interest of the bonds secured by the mortgages, within ten days from the date of the decree, without, and in the absence of, any averment in the said bill of the said company, and of any proof, in this cause, of a request by the holders of seventy-five per cent. in amount of the said bonds, oustanding under the mortgages, to the said trustee, to foreclose the said mortgages, or to institute proceedings to foreclose the same.

Argument for the Appellant.

First.

The Court below erred in granting leave to the Farmers' Loan and Trust Company to file its bill for the foreclosure of the mortgages on the property of the appellant, as a cross-bill, in this suit, and was without jurisdiction to entertain the bill, and render the decree of foreclosure and sale, herein, in accordance with its prayer, under the Constitution and laws of the United States.

1. Mr. Daniell says:

> "The proper time for filing a cross-bill, where such a bill is necessary, is at the time of putting in the answer to the original bill, and before the issue is joined by filing the replication. And as the matters of defence, upon which a cross-bill is founded, must be stated in the answer to the original bill, as well as in the cross-bill, it can seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue."
>
> 2 Daniell's Ch. Pr., 1650.

The District Judge granted leave to file the bill, as would appear from the record, on July 1, 1886, seven months after the Morgan Company filed its replication to the answer of the Farmers' Loan and Trust Company to the original bill.

That answer, which contained a general *demurrer* to the bill of the Morgan Company, purported to be a complete defence to the merits of the bill, traversing the allegations of fact therein, and averring other matters in bar of the relief asked by the complainant.

The answer submitted to the Court upon the facts alleged not only that the Morgan Company had *no lien* on the earnings or income or other property of the appellant, but that in equity and good conscience it was estopped from asserting any such claim. (Rec., p. 63, fol. 114.)

The issues thus presented embraced the *whole merits* of the claim asserted by the Morgan Company to a lien on the property of the appellant, prior in right and equity to the express lien of the legal mortgages, and a cross-bill for the foreclosure of those mortgages was not necessary to enable the Court to make a final decree in respect to that claim.

It is evident that the so-called cross-bill was interposed for an independent measure of relief in respect to the mortgages, and not as a defence to the claim of the Morgan Company.

It was thought, no doubt, convenient to include the litigations involved in the two bills in one suit; but the supposed convenience of such a procedure cannot, of course, enable the Circuit Court to take jurisdiction of the matters presented in the second bill, if such jurisdiction has not been conferred by the Constitution and laws of the United States; and the denomination of the bill as a cross-bill, if it be not, in fact, a bill which can be entertained by the Circuit Court as a cross-bill in the first suit, according to the principles which this Court has sanctioned with reference to the line dividing the jurisdiction of the Federal Courts from that of the State Courts, cannot operate to transfer the case from one side of that line to the other.

In the litigation, as it proceeded, the relative positions of the two bills were apparently reversed, the cross-bill becoming in effect an original bill, and the original bill a mere dependency on the cross-bill.

If the bill of the Morgan Company had been dismissed it is not supposed that the dismissal would have carried with it the bill of the Farmers' Loan and Trust Company.

That suit, for anything that appears, would have progressed to final determination and decree, substantially as disclosed by this record, independently of, and without regard to, the fate of the bill of the Morgan Company.

The important question is thus presented as to the power of the Court below to entertain such a suit, by way of cross-bill, in the first suit, without regard to the citizenship of the parties, and by virtue of its jurisdiction over the original suit.

It is clear that if the bill in question be an original bill for relief, or a bill which it was incompetent for the Court below to entertain, in the character of a cross-bill, in the original cause, without regard to citizenship, the suit cannot be maintained, as the complainant and one of the defendants are citizens of the State of New York.

This Court has conclusively adjudged that where there are several co-plaintiffs, and several co-defendants, in a suit in a Circuit Court, each plaintiff must be competent to sue, and each defendant must be liable to be sued, or the jurisdiction cannot be entertained.

Strawbridge *v.* Curtis, 3 Cranch, 267.
Coal Company *v.* Blatchford, 11 Wall., 175.

The principle applies to a suit in equity to enforce a legal or equitable lien or claim against real or personal property in the District where the suit is brought.

Bingham *v.* Luddington, 12 Blatch., 241.
Christmas *v.* Russell, 14 Wall., 80.

2. The present bill, it is respectfully submitted, cannot be said to be a true cross-bill, as defined by this Court in the leading cases of *Shields* v. *Barrow* (17 How., 145), *Ayres* v. *Carver* (*Ib.* 591), and *Cross* v. *De Valle* (1 Wall., 14), which have been almost always referred to when the Court has had occasion since to discuss the nature and office of that proceeding. (Rubber Company *v.* Goodyear, 9 Wall., 809; Ayres *v.* Chicago, 101 U. S., 187.)

It would seem from these authorities that the bill is an original bill for relief, as distinguished from a cross-bill, and as such not cognizable by the Circuit Court in any view of the subject, for want of the requisite citizenship of the parties.

The matters involved in the bill of the Morgan Company, were embraced by the issues raised by the answer of the Trust Company, which related to the alleged advances for the support and maintenance of the railroad, and the preservation of the security of the mortgage bondholders, and the effect of the transactions as creating an equitable lien upon the mortgaged estate prior in right to the legal and express lien of the mortgages.

The gravamen of the foreclosure bill of the Trust Company is a different and distinct matter, relating as it does to the alleged breach of the conditions of the mortgages, and the right of the trustee to enforce the security for payment of the debt by foreclosure of the mortgages and a sale of the mortgaged property, a controversy which is not necessary to be decided in order to have a final decree on the case presented by the original bill.

The complainant, in that bill, had no interest in any controversy between the mortgagor and mortgagees, defendants, in the original bill, touching the foreclosure of the legal mortgages, and no decree thereon could affect the equitable rights asserted by it in respect to the mortgaged property, if such rights existed upon the facts and the law of the transactions set forth in the original bill, and responded to in the answer of the cross-complainant to that bill.

It is the established doctrine of this Court that the legal subject-matter of a foreclosure proceeding is the mortgage debt, and the right to foreclose the equity of redemption by a sale of the property; and for that reason the decree of foreclosure and sale is held to be that final decree from which an appeal lies to this Court. (Whiting *v.* the Bank, 13 Pet. 6; C. & V. R. R. Co. *v.* Fosdick, 106 U. S. 70.)

The doctrine is clearly expressed by Mr. Justice Matthews in the opinion delivered by him for the Court in the last-named case, as follows:

> "What is indispensable in such a decree is that there should be declared the *fact, nature*, and *default* which constituted the breach of the conditions of the mortgage, and which justified the complainant in filing his bill to foreclose it, and *the amount due on account thereof*, which the mortgagor is required to pay, within a reasonable time, and which, if not paid, a sale of the mortgaged premises is directed. This is that final decree of foreclosure and sale which *determines and fixes the rights of the parties*, and from which, on that account, an appeal lies."

This statement presenting as it does with such clearness the character and scope of the legal subject-matter of a foreclosure bill, shows conclusively that the matter of the present bill is separate and distinct from the matter of the original bill, and should, for that reason, be made "the subject-matter of an original, independent suit." (Ayres *v.* Carver, 17 How., 595.)

3. The precise question, in this case, is whether the present bill, in which the complainant and one of the defendants are citizens of the same State, can be sustained, as a cross-bill, in the original suit, in the Court below, agreeably to the Constitution and laws of the United States.

It has been submitted that the subject-matter of the bill is such that it could not be deemed to be a true cross-bill if the parties were citizens of different States; but if this view were incorrect, it would not follow that the bill can be sustained as between the actual parties to the proceeding.

The principle by which the Circuit Courts are able to entertain cross-bills in equity, without regard to citizenship, is subject to limitations, which grow out of the nature of the constitutional jurisdiction of those Courts as limited by differences of citizenship.

Christmas *v.* Russell, 14 Wall., 80.

The principle confines the jurisdiction in respect to bills, filed as cross-bills, where the parties are citizens of the same State, to such as are necessary to the defence of the parties filing them, to the subjects-matter of the original bills, and are altogether auxiliary to the original suits.

Clarke *v.* Mathewson, 12 Pet., 172.
Dunn *v* Clarke, 8 Pet., 1.
Bank *v.* Turnbull, 16 Wall., 175.
Krippendorf *v.* Hyde, 110 U. S., 285.
Christmas *v.* Russell, 14 Wall., 80.
Schenck *v.* Peay, 1 Woolw., 184.

Where the bill is founded upon a different subject-matter from that of the original bill, or is in effect an original bill, or what is sometimes called an original bill in the nature of a cross-bill, it is not a supplemental, ancillary and dependent proceeding, within the sense of the authorities, and the jurisdiction of the Circuit Court must depend on the citizenship of the parties.

As the present foreclosure bill is founded upon a new subject-matter, and a different cause of action from that in the original suit, and is not necessary to the defence of the complainant to the merits of the original suit, and is not auxiliary to that suit, it is not within the jurisdiction of the Court below as a proper cross-bill in the original cause.

It would appear to be clear that a bill by a mortgagee for the foreclosure of the mortgage, a sale of the mortgaged property, and a personal judgment against the mortgagor, cannot be sustained as a cross-bill, in a suit in equity in the Circuit Court of the United States to establish and enforce an alleged equitable lien as paramount to the lien of the legal mortgage upon the property, if the parties to the so-called cross-bill are not citizens of different States, and the Court has thus no jurisdiction of the case, as made in the bill, independently of its jurisdiction of the cause of action in the original bill.

4. It is respectfully submitted, therefore, that the Court below had no power to entertain the bill, filed as a cross-bill, in this suit, or to render the decree thereon, and should have dismissed the same for want of jurisdiction.

Second.

The Circuit Court erred in adjudging the principal sums of the bonds to be due and payable in accordance with the mortgages, and in decreeing foreclosure and sale on the nonpayment of the amounts within ten days, without proof of a request to the trustee by the holders of seventy-five per cent. in amount of the bonds in default, to foreclose the mortgages.

1. The appellant denies the right of the Farmers' Loan and Trust Company to institute these proceedings to foreclose the mortgages, and the validity of the decree requiring the payment of the principal sum of the debt as a condition of preventing a sale of the railroad property.

The provision, in the mortgages, that on the default of the Company, continued for sixty days after demand, to pay an interest coupon, the principal of all the bonds shall be and become immediately due and payable, and that upon the request of the holders of seventy-five per cent. in amount of the bonds *so in default*, it shall be the duty of the trustee to *foreclose* the mortgages and sell the property for the payment of the principal sum of the mortgage debt, is in the nature of a *penalty*, and may be regarded as *stricti juris*, to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of *ambiguity*, in favor of the *debtor*.

C. & V. R. R. Co. *v.* Fosdick, 106 U. S., 77.

It was not the intention of the provision to give the owners of the specified amount of the bonds so in default, the right only to make the obligation of the trustee to proceed to a foreclosure and sale imperative, instead of optional, but it was meant to secure to the bondholders the right to *control and veto* the action of the trustee, and to determine for themselves whether *their* interests required the anticipated payment of the whole debt by foreclosure of the mortgages, and a sale of the mortgaged property, before the day fixed by the credit.

Such, we submit, is to be deemed the true construction of the contract, under the decision of this Court in the leading case last above cited.

In that case, the mortgage, in its eighth article, provided that the trustees, upon the written request of the holders of a majority of the bonds, "SHALL proceed to collect both principal and interest by foreclosure and sale of said property, or otherwise, as herein provided." (106 U. S., 76.)

This Court held that, under that article, the trustees were precluded from instituting the foreclosure proceedings upon their own motion, and without the request of the majority of the bondholders to collect the principal debt by foreclosure and sale of the mortgaged property.

2. The provision in the conditions constitutes the substantial and general provision of the mortgages as to *foreclosure* for the principal debt upon a default in the payment of the interest on the bonds.

The provision is, that in case the Railway Company shall fail to pay the principal, or any of the *interest* on any of the bonds when due and payable according to the tenor thereof, *and* "if *said default* shall continue sixty days after having been demanded (*i. e.*, the *interest*) then and thereupon the *principal* of all the said bonds shall be and become immediately due and payable"; and upon the request of the holders of seventy-five per cent. of the bonds and notice thereof served on the New York agency of the mortgagor, the trustee may and shall take possession of the railroad; "AND upon the request of the holders of seventy-five per cent. in amount of the bonds *so in default* which may be at any time outstanding, it shall be the duty of the Farmers' Loan and Trust Company to *foreclose this mortgage* and sell the property," for the payment of the principal and interest of the bonds (Record, pp. 93–94).

The provision has reference to the foreclosure of the mortgage for the purpose of enforcing the payment of the principal of the bonds, before the day fixed by the credit, upon a default in the payment of the *interest*, which operates as a *forfeiture* of the time fixed in the bonds for their payment.

This provision is the contract of the parties *creating and limiting* the power of the trustee in relation to the *foreclosure* of the mortgages for the payment of the principal of the debt, before maturity, on account of a default in the payment of the interest.

The condition precedent to that power, is the *request* of the holders of seventy-five per cent. in amount of the bonds in default and outstanding under the mortgages.

3. It cannot be maintained, therefore, that the limitation upon the power as to foreclosure for the principal sum of the mortgage debt, before its maturity, on account of a default in the payment of interest, is confined to a sale upon advertisement.

Such a construction, we submit, is without support in the language or intention of the contract, or the decision of this Court in the leading case of the *Railroad Company* v. *Fosdick*.

The provision, in the body of each mortgage, referred to, relates, expressly, as has been seen, to the *foreclosure of the mortgage*, before the stipulated day of payment of the debt, for default in the payment of interest; and the manifest purpose of the restriction in question was the protection of the bondholders, as a class, against the views of individuals and combinations of individuals, pursuing separate interests.

In the *Fosdick* case, the Court said:

"For while, as we have seen, one or any number of bondholders may prosecute a bill to foreclose the mortgage, upon default as to payment of a single coupon, or the trustees may intervene on behalf of all for the same purpose, because the failure to pay a single instalment of interest is made a breach of the condition of the mortgage; yet it is apparent that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests." (106 U. S., 77.)

The intent and meaning of the contract, in this case, plainly are that the action of the trustee in respect to foreclosure for the prescribed default, before the day fixed by the credit, shall be subjected to the wishes of the holders of seventy-five per cent. in amount of the bonds, for the protection of the bondholders as a class.

It was the manifest intention of the contract that the power of the trustee to anticipate the payment of the principal debt by foreclosure, on account of the prescribed default in the payment of interest, should become a living, active trust only "upon the request of the holders of seventy-five per cent. in amount of the bonds so in default which may be at any time outstanding" under the mortgages.

If there were any obscurity, or uncertainty, in the language of the contract, it would have to be so construed, of course, as to effectuate the intent and meaning of the parties. (Mauran *v.* Bullus, 16 Pet., 534; Bradley *v.* Packet Co., 13 Pet., 97; Canal Co. *v.* Hill, 15 Wall., 94).

In the last case the Court decided that when the substantial thing which the parties had in view can be gathered from the instrument, it will control mere formal provisions, which are intended as a means of attaining the substance.

The ascertained intention, of this contract, can be effectuated and satisfied only by the construction which secures to the holders of the specified amount of the bonds the right to determine for themselves whether or not, and when, the trustee shall institute foreclosure proceedings for the principal debt on account of a default in the payment of the interest.

It is to be observed, moreover, that as the stipulation, in this article of the mortgage for a *forfeiture* of the time of payment of the bonds, is in the nature of a *penalty*, it must be construed, under the rule recognized in the *Fosdick* case, in any case of doubt, in favor of the DEBTOR.

The clause, in the instruments, which provides "that nothing herein contained shall be held or construed to prevent or interfere with a foreclosure of this instrument, the appointment of a receiver, or any other act or proceeding appropriate in such cases by any Court of competent jurisdiction," does not affect or touch the express and general provision as to foreclosure found in the body of the mortgages.

It is not the grant of any authority to foreclose the mortgages.

No right is recognized by that clause which would not have existed without it.

It does not, in terms, or effect, authorize, or purport to authorize, the trustee to institute proceedings to foreclose the mortgages upon a default in the payment of the interest, before the maturity of the bonds, without the request of the holders of seventy-five per cent. in amount of the bonds then outstanding.

It determines nothing as to when, and upon what conditions, the trustee shall have the *right* to institute proceedings to foreclose the mortgages.

For the right of the trustee to foreclose the mortgages for the principal sum of the mortgage debt, before the day fixed by the credit, upon a default in the payment of interest, we are compelled to fall back upon the express and general provision in the body of the mortgages, as to foreclosure, and that provision subjects the action of the trustee to the wishes of the holders of the specified amount of the bonds then outstanding.

4. The provision in regard to that request, goes to the RIGHT of ACTION under the mortgages, and until it is shown that the trustee was requested, as provided, to *foreclose* the mortgages for the principal sum of the mortgage debt, on account of a default in the payment of the interest, there is no foundation for any proceedings, by the trustee, to enforce the payment of that debt by foreclosure of the mortgages for that cause.

5. It is respectfully submitted that the question upon the construction and effect of these mortgages, under consideration, is adjudged by the decision in the case of *Chicago and Vincennes R. R. Co.* v. *Fosdick.*

The decree, in that case, denied the appellant the right to redeem, and thus prevent a sale, on payment of the interest in arrears, and required payment of the principal debt as a condition of preventing a sale of the property, which was held to be a substantial error, requiring the reversal of the decree below.

The Court said that the right denied "cannot be regarded as other than important and valuable." (C. & V. R. R. Co. *v.* Fosdick, 106 U. S., 75.)

The 8th article of the mortgage, in that case, provided that if default should be made in the payment of any interest, and such default should continue six months, after demand, "*then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding*"; and that the trustees might so declare the same, and notify the mortgagor; and the article then provided, that the trustees, "upon the written request of the holders of a majority of the said bonds *shall* proceed to collect the principal and interest of all such bonds, by *foreclosure and sale* of the property, or otherwise, as herein provided."

The Court decided that even had the trustees rightfully declared the principal sum of the mortgage debt due, by reason of the default described, and given the proper notice thereof, nevertheless no bill could be filed by the trustees, to foreclose the mortgage for that cause, without the previous written request of the holders of a majority of the bonds then outstanding.

It was held that the principal debt did not become fully or absolutely due for all the purposes of the mortgage, before the day stipulated for its payment in the bonds, until the trustees were requested by the majority of the bondholders to proceed to collect the debt by foreclosure and sale of the mortgaged property.

The Court, speaking by Mr. Justice Matthews, said:

"It is, therefore, our opinion, that even had the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless the *foundation for proceeding* to foreclose for that cause, and of the decree requiring payment of that amount, would fail without proof that the bill had been filed for that purpose upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record."

6. The Court below, in this case, thus plainly erred in declaring the principal sums of the bonds to be due and payable for the purpose of foreclosure under the mortgages, and in decreeing their payment as a condition of preventing a sale of the property of the appellant.

It is respectfully submitted that the decree should be reversed, and the case should be remanded to the Court below with directions to dismiss the so-called cross-bill.

CHARLES H. TWEED,
Counsel for Appellant.

Supreme Court of the United

OCTOBER TERM, 1890.

THE TEXAS CENTRAL RAILWAY COMPANY,
Appellant,

vs.

No. 59.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHICOMPPANY, THE FARMERS' LOAN AND TRUST COMPANY,
Appellee, *et al.*

Additional Brief for the Appellee, the Farmers' Loan and Trust Company.

A single brief has already been filed by the Appellee in Nos. 55 and 59, as it was not supposed that the Appellant's brief, to be filed in No. 59, would differ from that already filed in No. 55 in discussing the same questions. The Appellant's brief in No. 59, however, has this day been received. It has evidently been prepared in answer to the Appellee's brief already filed. A few additional suggestions will now, therefore, with the permission of the Court, be filed in reply. They are directed to the suggestions of counsel under the fourth, fifth and sixth assignments of error, by which assignments the appellants claim that a request to the trustee from the holders of seventy-five per cent. in amount of the bonds in default was necessary to authorize the trustee to foreclose the mortgages.

In the first place, we do not see how the Texas Central Railway Company can be heard to contend that the principal of its bonds secured by these mortgages to the Farmers' Loan and Trust Company has not matured and become due and payable. In paragraphs XIV and XV of the bill filed by the trustee it is expressly alleged that the Railway Company had made default in failing to pay interest due May 1, 1885, and all interest since that date; that payment of such interest had been duly demanded; that the default had continued for sixty days, and that thereupon the principal of all the said bonds "is and has become immediately due and payable." Paragraph XIV contains these allegations as to the mortgage of 1879, and paragraph XV contains the same allegations in the same words as to the mortgage of 1881.

Now, both these paragraphs XIV and XV are expressly admitted to be true by the Texas Central Railway Company in its answer filed to our cross-bill (see *Record*, pp. 105 and 106, paragraphs XIV and XV).

Moreover, the Morgan Company, in its answer to our cross bill also expressly admits these allegations of our cross-bill to be true (*Record*, p. 108, *Subdivision* 3d).

How then can the Texas Central or the Morgan Company be heard to argue before this Court that the principal has not matured, and that the decree is erroneous in declaring the same to be due *when they have expressly admitted the claim?*

But passing this, a few words more are submitted as to the appellants' contention in this regard.

It has already been said (*Appellee's Brief*, p. 32) that the objection affects the decree only so far as it adjudges the principal to have become due, and that it does not affect the propriety of a judgment for interest; so that if the contention were sustained by the Court it would not be necessary or proper to vacate the existing decree, and compel the trustee to commence *de novo*, a course which would inevitably result in another appeal to this Court, and a continuation of the Receivership for four years more. On the other hand, the proper course to be pursued, even if the contention were sustained, would be to direct the decree to be reformed as a decree *nisi*, and the defendant adjudged a reasonable time within which to pay the interest, and on its failure to make such payment, then requiring a sale and the payment of principal and interest. The propriety of such a course appears from the Chicago and Vincennes case itself (106 U. S., 47).

But it may be suggested that this course was not pursued in that case, but on the contrary, the decrees were reversed.

But in the Chicago and Vincennes case (from which it is to be noted that Mr. Chief Justice Waite and Mr. Justice Harlan dissented), the Court expressly finds (p. 73) that there is no proof in the record to the effect that any coupon which was not funded was presented and payment thereof refused. The Court evidently was anxious to find some such facts as to authorize a decree *nisi* for interest. But it was not shown that the holders of any coupons which had not been funded, and so postponed, had been presented for payment. So there were no facts before the Court authorizing a decree *nisi*.

In the case at bar there is no funding, no postponing of the right to collect the coupons. The individual bondholders, even any one of them, as held by the Chicago and Vincennes case, can insist upon a foreclosure for the collection of his interest (p. 70).

It is hoped that nothing that may be said in pressing this point upon the attention of the Court will be construed as an intimation that the contention of the other side, based upon the Chicago and Vincennes case, should be sustained.' On the contrary it is insisted that to sustain this contention the Court would go very much farther than it went in the Chicago and Vincennes case, which certainly the Court will not be inclined to do.

It is not claimed that the clause at the close of the mortgages providing that nothing therein contained shall be held to prevent foreclosure in a Court (*Record*, fol. 55), is a grant of any authority to the trustee which would not have existed without it; still less is it claimed that it has the effect of maturing the payment of the principal moneys not otherwise matured. It is claimed, however, that this clause explains the meaning of ~~any~~ other provisions of the mortgages.

Just here it is proper to call the attention of the Court to a very important difference between the provisions of the Texas Central mortgages and of the mortgage of the Chicago and Vincennes Company.

The Chicago and Vincennes mortgage (106 U. S., p. 50) required something to be done by the trustee before the principal should become due. Reading the entire Eighth clause together, in the spirit in which the Court has declared it should be read, it means that, under certain circumstances of default and continued demand, without the consent of the bondholder, *the trustee might declare the principal due by notice to the defaulting company and foreclose for principal and interest if a majority of the bondholders so request.* The principal does not become due without such notification, and the notification is conditioned upon the request; all stand together. If the bondholders desire their principal to be collected, there is one way and one way alone in which they are to collect it; a majority of them must unite in a request to the trustee to notify the railroad company of the maturity of the principal, and to collect the principal and interest.

Now, the provisions of the Texas Central mortgages are entirely different, in that *no such notification must be given by the trustee to the railroad company in order to make the principal mature.* The principal matures absolutely, not by virtue of any notification to the railroad company, for none is required, but simply because of the default of the railroad company to pay interest when it becomes due, and said default continuing sixty days after demand (*Record*, fol. 50).

The principal thus having become due by the express terms of the mortgage, the question arises as to how it shall be collected and payment enforced. Here the request is essential if the trustee is to proceed by advertisement without the aid of the Court; but there is no limitation upon the power to proceed by bill in equity to collect this principal which has already matured. The clause to which we have alluded is inserted at the close of the mortgage to emphasize this, and to prevent any misunderstanding as to the intention of the parties.

HERBERT B. TURNER,
for Appellee.

IN THE

Supreme Court of the United States.

October Term 1887.—Nos. 969 and 974.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY, Appellant,

vs.

THE TEXAS CENTRAL RAILWAY COMPANY and THE
FARMERS' LOAN AND TRUST COMPANY, Appellees.

THE TEXAS CENTRAL RAILWAY COMPANY, Appellant,

vs.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY and THE FARMERS' LOAN
AND TRUST COMPANY, Appellees.

Appeals from the Circuit Court of the United States for the Northern District of Texas.

MOTION OF THE FARMERS' LOAN AND TRUST COMPANY, APPELLEE, TO ADVANCE.

Statement on Behalf of Morgan's Louisiana and Texas Railroad and Steamship Company.

The observation of the Court, speaking by the Chief Justice, in disposing of a similar motion in the railroad foreclosure suit of *Sage et al.* v. *The Central Railroad Company of Iowa*, (93 U. S., 419,) would seem to us to rule the present application. The Court there said:

> "Both the appellants and the appellees ask to have the cause advanced for a hearing, but, as only private interests are involved, we see no reason why it should have preference over other suits upon the docket. This motion is denied."

Referring to the statement, in the motion papers, that a large section of country, in Texas, is dependent upon this railroad, we observe that Mr. E. W. Cave, a witness in the Court below, testified that a large portion of the country, through which the road runs, "is now occupied by several roads in *competition* with the Texas Central Railroad, and this is to be considered as a factor in estimating the improvement of the business."

From this testimony it would seem that the country referred to is suffering rather from a plethora of railroads.

However that may be, the controversy, in this suit, would seem to involve private interests only, and not public interests, in the sense in which those terms, in their present relation, are understood to be used by the Court.

It is to be observed that each of the parties, asserting a first and paramount lien on the property of the Texas Central Railroad Company, originally, asked the Court below to take charge of that property by its Receiver.

The cross-bill of the Farmers' Loan and Trust Company, claiming that its liens were superior to the lien, if any, of Morgan's Louisiana and Texas Railroad and Steamship Company, the complainant in the original bill, averred as follows:

"*Until such sale can be had and the proceeds thereof be distributed, your orator is likewise advised and charges* *that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and the rights, franchises, and property of the said defendant, The Texas Central Railway Company, of whatever name, nature, and description, including all its moneys on hand and the earnings of the same, continue to remain and be placed in the hands and under the control of a receiver or receivers, with such proper powers and control over the same as to the Court shall seem right and equitable to be conferred.*"

Mr. Charles Dillingham, referred to in the present petition as the Receiver, in this case, was the appointee of Judge Pardee; and no charge, or complaint, as far as we are aware, has ever been made against his integrity or his capacity.

His letter to the learned counsel of the Trust Company, on pages 12 and 13 of its present petition, is itself evidence of his care and conservatism in the administration of this trust.

Mr. Dillingham, it would seem, has represented, or will represent, to the Court below, the necessity for further resources to keep the railroad in a safe and suitable condition; and his statements in that regard, in the letter referred to, appear to be fully confirmed by the report of Mr. Charles C. Deming, the Trustee's own railroad expert, which is set forth at length on pages 15–21 of the present petition.

It is perfectly obvious, from all that is brought to the attention of the Court by the Trust Company, that certain amounts are required, and should be advanced, to put this road in better shape for public travel and transportation; nevertheless, the present bondholders insist, as the Court is informed, that their representative shall oppose, and, if possible, prevent, the raising of any money for necessary repairs, although it is believed, as stated, that the course proposed, if successful, will cause what are spoken of as the "public interests," on whose behalf the motion is said to be made, to suffer, for want of a safe and suitable means of communication.

The course of action in that regard, proposed by the bondholders, is assigned as the reason for the application now made to the Court by their representative.

It is stated that the present bondholders are ready to buy the road and put it in order, but that determination would seem to be premature, for, until the litigation is ended, it doth not appear that there must be a sale.

In such a case, until sale confirmed, the equity of the mortgagor as against the mortgagee is not exhausted, and the former has a right to redeem the property. (Chicago and Vincennes R. R. Co. *v.* Fosdick, 106 U. S., 71.)

By the decree appealed from (Article X) it is adjudged that Morgan's Louisiana and Texas Railroad and Steamship Company has an equitable lien upon all of the property of the Texas Central Railway Company, to the amount of $761,992.04, with six per cent. per annum interest thereon from November 1, 1884, until paid; said lien, however, being junior and subordinate in all respects, upon the said property, to the liens growing out of the mortgages or deeds of trust executed to the Farmers' Loan and Trust Company.

The important question of the character and priority of that lien will be discussed, on the part of the Morgan Company, when this case is for argument, on its merits, upon the pertinent evidence in the record, with the hope that the views of the law upon that subject, in conformity with which the appeal was taken, will receive the approval of this Court.

There is nothing whatever in the record, on these appeals, which justifies a statement that the course of the Morgan Company has been dictated by a desire to injure the interests of the bondholders, or which shows that anything whatever has been done by it with the view of injuring those interests.

J. HUBLEY ASHTON,
Of Counsel for Morgan's Louisiana and
Texas Railroad and Steamship Company.

Supreme Court of the United States.

OCTOBER TERM, 1887.

Nos. 969 and 974.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY,
Appellant,
against
THE TEXAS CENTRAL RAILWAY COMPANY AND THE FARMERS' LOAN AND TRUST COMPANY,
Respondent.

THE TEXAS CENTRAL RAILWAY COMPANY,
Appellant,
against
MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY AND THE FARMERS' LOAN AND TRUST COMPANY,
Respondent.

MOTION TO ADVANCE THE CAUSES, PETITION OF THE TRUSTEE ON BEHALF OF THE SAME, AND NOTICE OF SUBMISSION. and Brief

HERBERT B. TURNER,
Of Counsel for the Farmers' Loan and Trust Company.

M. B. Brown, Printer and Stationer, 49 & 51 Park Place, N. Y

Supreme Court of the United States. 1

(October Term, 1887.)

Nos. 969 and 974.

Morgan's Louisiana and Texas Railroad and Steamship Company,
Appellant,
vs.
The Texas Central Railway Company, and The Farmers' Loan and Trust Company, 2
Respondent,

The Texas Central Railway Company,
Appellant,
vs.
Morgan's Louisiana and Texas Railroad and Steamship Company, and The Farmers' Loan and Trust Company,
Respondent. 3

Motion to Advance the Causes.

And now comes the Farmers' Loan and Trust Company, the respondent in each of the above-entitled causes, and moves this Honorable Court that these causes be advanced upon the docket, and that the appeals therein be heard at the same time and at an early date, to be fixed by the Court, and makes such motion on the grounds that 4 large public interests and the well-being of a large section of country are injuriously affected by the delay which will result in case it is necessary to defer the disposition of the causes until they can be reached in their order on the docket of this Court; and for further grounds refers to its petition herewith filed.

Herbert B. Turner,
Of Counsel for The Farmers'
Loan and Trust Company.

SUPREME COURT OF THE UNITED STATES. 5

Morgan's Louisiana and Texas
Railroad and Steamship Company,
Appellant,

vs. No. 969.

The Texas Central Railway Company, 6
and The Farmers' Loan
and Trust Company,
Respondent.

The Texas Central Railway
Company,
Appellant, 7

vs. No. 974.

Morgan's Louisiana and Texas
Railroad and Steamship Company,
and The Farmers' Loan
and Trust Company,
Respondent.

The petition of The Farmers' Loan and Trust Company respectfully shows to this Honorable Court as follows: 8

I.—The appeals in the above-entitled causes are taken by two corporations, the stock of which is owned and controlled in the same interest, from a decree of the United States Circuit Court for the Northern District of Texas, ordering the sale of the Texas Central Railway Company and its property, and

9 foreclosing two trust deeds made to your petitioner,
The Farmers' Loan and Trust Company, to secure
bonds.

II.—The litigation was commenced in the month of
April, 1885, by the filing of a bill by Morgan's Louisiana
and Texas Railroad and Steamship Company against
the Texas Central Railway Company for the appoint-
ment of a receiver of said Railway Company and for
the sale of its property, to enforce an alleged lien.
10 Your petitioner, the Trustee under the trust deeds
or mortgages made by the Railway Company, inter-
vened in the cause, and also subsequently filed a cross-
bill of foreclosure. The decree sustains the priority
of the lien of the mortgages to the extent of over
$4,000,000, and adjudges that the lien of the original
complainant is subsequent.

III.—The railroad scarcely pays expenses of opera-
tion. It is in such a condition that, in the opinion of
persons who have examined it, life and property are
11 threatened by its continued use. Your petitioner does
not hesitate to say that in its present condition it can-
not fulfill its duty to the public or to those interested
in it. It is the sole outlet of a large section of north-
western Texas, running up into a region where the
people are far beyond the reach of any other railroad,
and which must suffer irreparably unless the road can
be put in order. For these and other reasons herein
set forth in detail, your petitioner deems it its duty to
lay the facts before this Court, considering them to be
12 exceptional and such as call for special action, and to
ask that the Court will advance these causes upon the
calendar and set them down for hearing together at an
early day.

IV.—Your petitioner deems it necessary that the Court, in order to understand the situation, should be informed as to certain facts which appear on the record of the cause. The original complainant herein, Morgan's Louisiana and Texas Railroad and Steamship

Company (generally known as the Morgan Company), 13
is a Louisiana corporation, incorporated about 1878.
Soon after its incorporation it became the owner of a majority of the shares of the Houston and Texas Central Railway Company, a Texas corporation, and thus controlled the business operations and general policy of one of the chief railroads of Texas, which has a main line and several branches or divisions.

V.—About a year afterwards the parties in interest desired to extend the Houston and Texas Central lines. 14
To do this, they found it necessary to form a new corporation. This was the origin of the defendant, the Texas Central Railway Company, which was incorporated in 1879, subsequently amending its charter in 1881.

VI.—The defendant company so incorporated built two railroads, a road from Ross Station, in McLennan County (the terminus of one of the divisions of the Houston and Texas Central), running in a northwesterly
direction to Albany, a distance of about 175 miles, and 15
also another road, from Garrett, in Ellis County, on the Houston and Texas Central, northeasterly to Roberts, in Hunt County, a distance of about 52 miles. This last division is entirely distinct from and unconnected (except by the Houston and Texas Central lines) with the previous one. The first of these roads or divisions connects at Ross station with what is known as the Waco Division of the Houston and Texas Central, which again connects at Bremond station with the Main Line; and the other di-
vision connects with the Main Line of the Houston and 16
Texas Central road at Garrett, some distance north of Bremond. These Texas Central roads were built as branches or divisions of the Houston and Texas Central, and they were, in fact, and still are, operated as such under the same management.

VII.—The defendant, the Texas Central Railway Company, was organized and incorporated by the stockholders of the Morgan Company and the Houston and

17 Texas Central Company. A few shares were placed in the names of individuals to qualify them to act as directors, but with these exceptions the Morgan Company acquired, in pursuance of subscription, two-thirds of the capital stock of the Texas Central, and the Houston and Texas Central the remaining one-third. The new company issued bonds for $15,000 per mile. The trust deeds to secure these bonds were made to your petitioner, which is a New York corporation, as trustee, and are dated September 15, 1879, and May 16, 1881,
18 respectively. The management of the new company was placed on its organization and continued to be in the hands of the same officers and directors that managed the Houston and Texas Central. The officers derived their compensation from the latter company, which took all the receipts and paid out all the disbursements. No dividend on stock was ever declared. The Texas Central was in all respects wholly auxiliary to, dependent upon and subservient to the Houston and Texas Central.

19 VIII.—The Houston and Texas Central Railway Company was thrown into the hands of Receivers (without notice to the mortgage trustees) under a bill filed by the Southern Development Company in February, 1885, in the United States Circuit Court for the Eastern District of Texas. The Southern Development Company is a California corporation, which owns or did own the capital stock of the Morgan Company, which latter company owns a majority of the capital stock of the Houston and Texas Central, which last-named company with the
20 Morgan Company own the capital stock of the Texas Central, as has already been stated, so that all these companies are under the same control, and practically represent the same interests. (Your petitioner is informed that the Southern Development Company has since transferred this stock to another company, organized in the same interest, but as to this it has no knowledge.) The Southern Development Company, in its bill of complaint against the Houston and Texas Central Railway Company, alleged insolvency, and set up that it

was a creditor for more than $600,000 for money loaned, 21
for which indebtedness it claimed a preference over the mortgage debt. A demurrer on the part of the trustees to this bill was dismissed by the Circuit Court in May, 1886, Woods and Pardee, *JJ.*

IX.—Two months after the filing of the bill of the Development Company, the Morgan Company filed the original bill of complaint herein against the Texal Central, alleging that the latter company became indebted to the Houston and Texas Central to the 22
amount of nearly $800,000, and made its promissory notes for such indebtedness, due on demand, securing them by the pledge of the entire amount of certain General Mortgage bonds, aggregating over $2,250,000, which were to be issued under a junior mortgage to the Metropolitan Trust Company of the City of New York, made in October, 1884; that the Texas Central was in default in the payment of the notes, and that in order to make a pledge of the bonds, which were not yet countersigned and certified by the Metropolitan 23
Trust Company, as trustee, the mortgage not yet having been properly recorded, the Texas Central, in November, 1884, issued and delivered to the Houston and Texas Central its certificates in lieu of bonds, pledging itself to deliver the bonds as soon as executed; and that the latter company pledged the notes and certificates for bonds as part security for an indebtedness of over a million due by it to the complainant, the Morgan Company, which latter company is alleged to be the holder, as pledgee, 24
of all the notes and certificates for bonds. Then follow in the said bill of complaint allegations by which it is sought to prefer this claim of the Morgan Company for money loaned to the prior indebtedness to the bondholders, the money being alleged to have been advanced by the Houston and Texas Central to the Texas Central "*at various times* for taxes, fuel, supplies, labor, repairs, operating and managing expenses, proper equipment and useful improvements and other

25 necessary expenditures by which its railway (the Texas
Central) has been kept in safe running order, its
business and importance increased, and thereby
rendered more beneficial to the bondholders." and the
further statement "that the said indebtedness was
contracted by the defendant upon the consideration of
its promise to pay the same out of the earnings of its
railway, and that the said indebtedness was and is in
equity and good conscience a first lien and charge upon
the income and property of said railway." The prayer
26 of the bill is for the appointment of receivers, "with
power to manage, control and exercise all of the fran-
chises whatsoever of the said railway company, and if
need be, under the direction of the Court, to sell,
transfer and convey the whole of the property," and
for other relief.

X.—Subsequently your petitioner filed its cross-
bill in said cause to foreclose the mortgages made to it
by the Texas Central as aforesaid, and such proceed-
27 ings were had that at the April Term, 1887, a decree of
foreclosure and sale was rendered, after argument
and after it was shown to the Court by undisputed
evidence that the control of the Morgan Company,
of the Houston and Texas Central and of the Texas
Central, was in the same hands, and that the lat-
ter road was entirely governed by the Houston and
Texas Central, constituting in fact divisions of it. In
the decree, after finding the facts, including the default,
the Court finds that the trustee is entitled to a decree
28 for the sale of the property to satisfy the principal and
interest of the bonds; that the claim of the Morgan
Company is in all respects subsequent and subsidiary
and junior to the lien of the mortgages to your peti-
tioner; and, finding the amount due on said bonds
and unpaid coupons to be $4,015,528.98, besides costs,
the Court adjudges that, in default in the payment
of said sum, the property covered by the mortgages
should be sold, and that if there be any surplus,
after satisfying the bonds and costs and expenses,

the balance be applied to the payment of the amount 29 decreed due the Morgan Company; and further, that if the proceeds of the sale are not sufficient to satisfy the amount due your petitioner, as trustee, and the Morgan Company, then your petitioner and said Morgan Company should have a personal judgment against the Texas Central Railway Company for the balance and have execution therefor.

XI.—The only question arising on the trial of the cause in the Circuit Court was as to the rank of the Morgan Company's debt, and whether priority should be accorded to it over that of the bondholders. 30 Nevertheless, although no question had been made by either company as to the amount due, or as to the obligation of the defendant railroad company on the bonds issued under these mortgages, an obligation which was alleged by the Morgan Company in its original bill, and also expressly admitted by the railroad company in its answer, several and separate appeals were taken to this Court from the said decree and 31 from each and every part thereof by the original complainant Morgan's Louisiana and Texas Railroad and Steamship Company, and by the defendant the Texas Central Railway Company, and supersedeas bonds were given by these companies on such appeals in the sums of $300,000 each. In this way the parties interested, being the same persons who had placed these railroads in the hands of receivers, succeeded in staying the execution of the decree of foreclosure and sale, although their contention before the 32 Court below had simply affected the order in which the proceeds of the sale should be distributed, and although they had themselves, in the original bill filed by the Morgan Company, prayed, as above stated, for a sale of all the Railway Company's property.

XII.—In view of all these facts, your petitioner submits it to this Court whether it is not warranted in charging that these appeals are taken by these parties

33 simply for the purpose of delay, and not to enforce a substantial right.

XIII.—The said mortgages made by the Texas Central Railway Company contained provisions to the effect that in case of default in payment of interest for sixty days after demand, then the principal of the bonds should become due, and upon request of the holders of seventy-five per cent. of the outstanding bonds, and notice of such request, the Trustee should
34 take actual possession (with or without entry or foreclosure), of the railway company, and all the mortgaged property, and manage and operate the same. Such default having occurred, your petitioner was duly requested by the holders of seventy-five per cent. of said bonds to move said Circuit Court that possession be delivered over to your petitioner, as trustee on behalf of the bondholders. On such motion being made and argued, such possession was at first ordered by said Circuit Court, Hon. Don A. Pardee,
35 Judge, presiding, to be delivered over to your petitioner; but subsequently a rehearing of the motion was granted by said Judge, which was had before Mr. Justice Harlan, and the result of such rehearing was that such motion for possession was denied by order filed October 29, 1887. The denial of said motion was the result of the opposition of the Texas Central Company and of the Morgan Company, representing the same interests as above stated.

XIV.—It has been represented to your petitioner,
36 and your petitioner believes the fact so to be, that the Texas Central Railway, so far as income is concerned, is and always has been, an unprofitable piece of property, in view of its large bonded indebtedness, only a portion of the proceeds of which was actually expended in building the railroad. A few days after the Circuit Court took possession of the railroad, as aforesaid, the receivers, on their petition, filed April 22, 1885, were authorized by the Court, to borrow $15,000 for the completion of a round-house, shops,

and other necessary buildings, with side-tracks, at 37
Walnut Springs on the line of the road; and on the day following they were authorized to borrow $15,000 more to pay back pay-rolls. Subsequently, they were still further empowered to issue certificates for $30,000 for supplies, wages of employees, mechanics' liens, traffic balances and other current expenses. Some of these obligations have been paid, but your petitioner is informed by the receivers that there are now outstanding receivers' certificates to the amount of $25,000. 38

XV.—On the fourth day of June, 1887, the receivers filed a petition for leave to borrow $40,000 in addition to the above-mentioned indebtness for certificates, alleging that owing to protracted drouth the receipts of the company had been insufficient to pay the ordinary operating expenses of the road, and that they would continue to be insufficient to pay such expenses until the crops began to come in, which would be about the first day of September, 1887, and that in order to 39
pay past due operating expenses and the ordinary operating expenes for the months of June, July and August, 1887, such amount of $40,000 would be required by the receivers, and that it would be impossible for them to conduct the railway unless the Court should authorize them to borrow said sum and to issue debentures therefor to be a lien second only to the lien for $25,000 of receivers' certificates outstanding under previous orders. Under this petition no final action has been had, and your 40
petitioner is informed that it is the intention of the receivers' attorneys to supplement the same by an additional petition, asking for leave to borrow a very large sum of money. This information came to your petitioner by letters had between the receivers and their attorneys and the attorneys of your petitioner. The receivers' letter, and the engineer's report, therein referred to, are as follows:

41 Texas Central Railway Company,
Receiver's Office,
Houston, Texas, November 9, 1887.

Herbert B. Turner, *Esq., New York, N. Y.:*

My Dear Sir:—I have delayed answering your letter
of October 24th until I could get full reports from the
Engineers of the absolute necessities of the Texas
Central for next year. This I have obtained and en-
close herewith. The first item—widening banks—we
can do without. As to the bridges we should have
42 them. Temporary bridges have been put in, which
will go out at first high water. Trestle we must have.
We have been unable to furnish from the earnings
proper renewals of cross-ties, and more than 500 per
mile have been in since the building of the road, seven
years or more, and they are worn out and worthless. I
think this item absolutely necessary for the safe run-
ning of trains. We ought to have the 100 tons of new
rails, but I think we may get along without them. The
bridge lumber we must have. Repair to locomotives
is necessary; also to cars. Eight locomotives is not
sufficient to run 228 miles of road, and new ones will
43 have to be provided soon.

We ought to have the new cars asked for, but by
putting the old ones in good repair and borrowing can
manage to run, though not with good economy.

On the N. E. Division:

The ties are necessary, also the piers at Trinity River
Bridge. This is a bad crossing, and we have much
trouble with the wooden piers under a good iron
bridge. Think $1,000 will do for platforms. We need
the new coaches, as now have to hire. On the whole,
I think the Engineer's estimate can be cut down to
$150,000. In the year 1886 we operated the 228 miles
44 of road for about $252,000, and fairly maintained it.
This year the earnings have been less, and I have not
been able to properly maintain the property. Up to
August 31 we had spent $138,000, against $175,000 last
year. In September we had the flood, and the expense
was nearly $15,000 more than ordinary operating
expenses thereby.

What the earnings will be next year no one can esti-
mate, and therefore I am unable to say what portion of
this expense can be paid by earnings.

We have out $25,000 Receivers' Certificates, due in
December.

I have done nothing about our motion for issuing 45
receiver's certificates, but it must necessarily have attention soon.

I want to do in these matters what the parties in interest deem best for the property. I hope you and Mr. Tweed, or you and Farrar and Kruttschnitt, may be able to agree what shall be done; then I will take great pleasure in doing it.

Very truly yours,
C. DILLINGHAM,
Receiver.

46

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY.

OFFICE OF
GENERAL TRANSPORTATION MANAGER,
HOUSTON, TEXAS, NOV. 9, 1887.

CHAS. DILLINGHAM, Esq., *Receiver, Houston, Texas:*

DEAR SIR—Herewith please find statement from Engineer and Superintendent Donald Allen, from
Master Mechanic L. C. Nobis and from Master Car- 47
builder James McGee. I have withheld details and submit gross amounts of different items estimated to be spent to put the property in good serviceable condition, and necessary to provide proper facilities with safety and economy. There has been expended to date $14,915.88 plus operating expenses proper in temporarily repairing damages caused by the the late floods. The additional amounts asked for are partly for rebuilding bridges destroyed, and for 100 tons 56-lb. rails, which was badly bent and broken, rendering them unserviceable for permanent use. This road, say 228
miles has but 170 freight cars, 100 flat and 70 box. At 48
least 50 more box and 20 stock cars should be furnished to prevent the large annual outlay for mileage to other roads for the transaction of its business.

Trusting that the amount asked may be furnished,

I am, yours truly
A. H. SWANSON,
G. T. M.

49 Itemized Statement of Amount necessary to put the Texas Central Railway in proper order.

	Scraper work—Widening embankment	$8,000 00
	New stone piers for four iron bridges	24,000 00
	Two new iron bridges, 150 feet span	16,200 00
	Taking down and re-erecting one 150 feet span	1,200 00
	To complete trestle, washed out	1,000 00
	For cross-ties	44,000 00
	Switch-ties	540 00
	100 tons, 56-pound steel rail, at $42 per ton	4,200 00
50	Track bolts and spikes	1,350 00
	Bridge timbers	3,525 00
	Ironwork for trestle bridges	764 00
	Total	$104,779 00

Motive Power.

	Repairs to 8 locomotives	$7,120 00
	Three new locomotives at $7,000	21,000 00
51	Total	$ 28,120 00

Rolling Stock.

	Repairs to 6 coaches	$5,888 00
	Repairs to 3 baggage, mail and express cars	887 00
	Cost of supplying signal apparatus	270 00
	Repairs to 70 box cars	4,000 00
	Repairs to 100 flat cars	4,000 00
	50 new box and 20 stock cars	33,000 00
52	Total	$48,045 00

Northeastern Branch, 32 *Miles.*

16,000 gross ties	$8,000 00
2 stone piers, Trinity Bridge	8,000 00
Repairs to platforms, etc	2,500 00
New combination coach	3,000 00
Total	$21,500 00

Recapitulation. 53

Roadway, bridges, etc.	$104,779 00
Motive power	28,120 00
Rolling stock	48,045 00
North Eastern Branch	21,500 00
Grand total	$202,444 00

XVI.—Your petitioner, in view of the statements
so made to it, deemed it necessary and proper to send
to Texas Mr. Charles C. Deming to examine and report 54
respecting the road and the condition of the same.
Mr. Deming is a railroad expert, conversant with railroad construction and management, having been for several years almost constantly occupied in such construction and management. He has made and rendered to your petitioner the following report, and your petitioner submits herewith his affidavit in support of the same:

"Herbert B. Turner, Esq.: 55

"Dear Sir—Pursuant to your request I have made an examination of the Texas Central Railroad, and report as follows:

"On the morning of December 22, 1887, I was met by
Mr. Swanson, the Master of Transportation of the
Houston and Texas Central and of the Texas Central
Railroad, with a special car, and started with him for
Ross, the southern terminus of the Texas Central Railroad. We arrived at Ross at about three o'clock in
the afternoon and examined the Texas Central Road
from Ross to Walnut Springs. It then became dark
and we continued on to Albany, leaving there early the 56
next morning and examining back from Albany to
Walnut Springs.

"The ties on this portion of the road are of oak, cypress and yellow pine. With the exception of about four hundred ties to the mile, the original ties put in the road still remain there, and as ties under the best condition do not last over six or seven years, it is manifest that all the ties on this portion of the road will need renewal very shortly. This road was constructed from 1879 to 1881. Mr. Swanson's idea is to put in as renewals five hundred ties to the mile, not

57 because more ties are not needed, but because he thinks that one tie in four will sustain the track. New ties here are needed as a matter of absolute safety. The old ones are so decayed that in many instances the spikes can be taken out with the hand, and there is no support to the rail. Those ties which had been taken out and were lying along the side of the track were so decayed as to be nothing more than punk and useless, even as firewood. As a matter of safety to the traveling public and to prevent serious loss to the company occasioned by accidents which will surely occur unless the track
58 is supported by new ties, the amount requested by Mr. Swanson should be furnished at once. More will be needed in a very short time, and within the next two years I should say that every tie would have to be renewed.

"In places along the line of this road the embankment has been allowed to fall away, and for many miles is not as broad as the tie, so that the ends of the tie overlap the bank. There is an unlimited supply of ballast within easy reach, and there is no reason, except want of funds, why these banks should not be repaired. It is impossible, even with the greatest care,
59 to keep the track in proper condition and prevent sinking if the embankment is allowed to remain in its present condition. It is the poorest kind of economy to save in the banks.

"One of the most serious difficulties in keeping this road in proper condition arises from the heavy floods which are liable to occur once or twice a year. These floods are occasioned by cloud-bursts, and the small streams, over which the road crosses, rise thirty or forty feet in a few hours, carrying away bridges and sweeping the track and road-bed many hundred feet into the neighboring fields. During the last floods,
60 in September, 1887, four bridges were carried away and about fifteen miles of track swept off the line of the road.

"All the important bridges along the line of the road are of iron, with wooden foundations. Mr. Swanson has requested authority to build these foundations of stone, and there can be no question as to its advisability or economy. Stone is found along the line of the road and can be quarried very cheaply. With stone foundations these bridges would undoubtedly be able to withstand any flood and would relieve the company from the necessity of continual repairs and

from the expense occasioned by suspending traffic during 61
the repairs to the bridges.

"At the first crossing of the creek called Steel's creek, an iron bridge, 150-foot span, on wooden foundations, was carried away last September. At Aquila creek another bridge was carried away. At the second crossing of Steel's creek, an iron bridge on wooden foundations was carried away, and at the third crossing of Steel's creek the water was up to the chords, but the bridge was saved. Unless these bridges are protected by stone foundations the public is constantly subject to delays and entire stoppage
of trains for many days at a time. When first-class 62
iron bridges costing about $8,000 apiece are continually liable to destruction from want of proper support, as shown by the loss of four bridges during the fall of 1887, the economy and necessity of stone foundations cannot be questioned.

"Previous to this severe flood of September, 1887, there had been no rain in this portion of the country for twenty-two months, a period of drought that has had no counterpart in thirty years. The result was that the crops were killed, cattle died and the inhabitants vacated their homes and went to other portions
of the state. During this period trains were only run 63
three times a week. Since September there have been frequent rains; the ground is in excellent condition; crops of cotton, corn and grain are looking well and the people are commencing to return to their old homes. The day before I went over the road a special train had been used to carry returning settlers into the country adjacent to the line of road.

"Only two through trains a day, one each way, called mixed trains, carrying freight and passengers, are run on this road, the schedule time being about 14 hours from Ross to Albany, or about thirteen miles an hour
including stops. I passed both of them and noticed 64
that two cars were comfortably filled with passengers and there seemed to be considerable freight, ten freight cars on one train and thirteen on the other. Between Ross and Cisco two freight trains, one each way, run daily.

"On the one hundred and seventy miles of road from Ross to Albany, only 44,218 ties, less than 400 to the mile, have been put in since the road was first opened, and many of these, it is claimed, were to make up deficiencies in original construction, so that that number of ties does not really represent the amount of renewals.

65 "In that portion of the road which was carried away old and discarded Houston and Texas Central rails have been put in in place of the rails which were destroyed. These rails are in bad condition and ought to be renewed. They were bought in the emergency and were not intended for permanent use in the track.

"Taking up Mr. Swanson's requisition in detail:

"*Widening embankments*, $8,000.

"This amount is not excessive. What is needed is a
force on a construction train adapted to the pur-
66 pose, with a commissary department and conveniences
for feeding and sleeping the gang. The cars could be hired from the Houston and Texas Central Road. The Texas Central has no cars available for this purpose, and in fact has no construction car or caboose. Three trains of two cars each, without locomotives, belonging to the Houston and Texas Central Road are even now in constant use by the Texas Central for bridge and section gangs.

"*New stone piers for four iron bridges*, $24,000.

"They could probably be built for $2,000 less. I
67 have explained above the necessity for these stone
piers.

"*Two new iron bridges*, $16,200.

"These are needed to take the place of the two carried away over Steel's Creek, first and second crossing. They would cost about $16,000, depending upon the market price of iron at the time of making the contract.

"*Taking down and re-erecting one one-hundred-and-fifty foot span*, $1,200.

68 "The crossing at Duffan Creek is badly located with reference to the angle at which the water strikes the bridge. The cost of changing the location, and at the same time raising the grade to a point of comparative safety from water would cost at least $1,200.

"*Cross-ties*, $44,000.

"This estimate is based on five hundred new ties per mile for one hundred and seventy-eight miles of road at fifty cents apiece. These ties have to be transported for a long distance and cannot be delivered along the line of road for less than fifty cents.

"100 *tons of steel rails*, $4,200. 69

"The one hundred tons of steel rails mentioned are to take the place of the old discarded rails purchased from the Houston and Texas Central and are necessary. They could probably be delivered if purchased now for about $3,600.

"The estimate for switch-ties, track bolts and spikes, bridge timbers and ironwork for trestle bridges is not excessive.

"The trestle bridge, for repairing which $1,000 is mentioned, has already been replaced from receipts since the date of the requisition.

70 "As to the estimates of Mr. Swanson, therefore, for improvements and renewals pertaining to the roadway and bridges, amounting to a total of $104,779, I consider that each one of the items there mentioned is necessary, with the exceptions stated, and that the amounts required are moderate. This expenditure would merely put the road in a fairly safe condition, and does not contemplate putting it in a first-class condition, which would involve a very much greater outlay than is mentioned in Mr. Swanson's estimate.

71 "In going over the road it was perfectly apparent that travel upon it was unsafe. The defective condition of the ties, the leanness of the embankment, and the consequent sinking of the rail at the joint was very noticeable and occasioned feelings of apprehension for one's safety. Unless the suggested repairs are made it is merely a question of time when some serious accident will occur, no matter how good the management may otherwise be.

"*Repairs to eight locomotives*, $7,000.

72 "Mr. Swanson tells me that these locomotives have not received a thorough overhauling for several years. Two machinists are employed in the shops at Walnut Springs who can make necessary repairs to the locomotives, but the material necessary for these repairs must be purchased, and will cost somewhere in the neighborhood of the amount mentioned, $7,000.

"I do not agree with Mr. Swanson that three new locomotives are needed at present. If business picks up and more trains are required to attend to the business, new locomotives will be necessary, but pending the outcome of this season's business, I think that the road

73 can be carried on with its present supply of locomotives.

"In view, however, of the fact that that portion of the Texas Central road which runs from Garrett to Roberts has no equipment whatever of its own and has always used the equipment of the Houston and Texas Central road on a rental or mileage basis, three locomotives at least are needed, if intended for use on that portion of the road.

"It is undoubtedly true, as stated by Mr. Dillingham in his letter of November 9, that eight locomotives are not sufficient equipment for 178 miles of road, assum-
74 ing that the earning capacity of the road is commensurate with its bonded indebtedness of $15,000 to the mile, but as the earnings for the last two years have not exceeded its operating expenses, I would recommend working with the present locomotive equipment until the revival of business along the line of the road makes additional equipment an essential.

"In other words while additional equipment may be most desirable it is not a matter of immediate necessity.

"*Rolling Stock* . . . . $48,045.

75 "A large portion of the business of the Texas Central road at Albany is the shipment of cattle. The Company has no stock cars and is obliged to ship all the cattle in borrowed cars, on which it pays mileage. Almost all the freight on this road is through freight and carried frequently as far as Kansas City, St. Louis and New Orleans without change of cars. The result is that with the small equipment of the Texas Central road it is almost always without cars of its own on hand. I think that the purchase of some stock cars is essential to the economical operation of the road, and to the convenience of the shippers who are frequently
76 obliged to delay cattle shipments until suitable cars for the purpose can be borrowed. Additional box cars are undoubtedly needed, but are not essential. The fact that no stock cars are coming into the country but all going out, explains why the ownership of stock cars is of more importance than the purchase of additional box cars.

"I cannot say anything definite in regard to the repairs to the rolling stock for which Mr. Swanson has made a requisition of about $14,000. He tells me that the cars have received but slight repairs since they have been on the road, and that the amount of his

requisition is very moderate. It was impossible to 77
make investigation of the rolling stock, for the reason
that most of it, as above stated, was not on the line of
the road at the time of my visit.

" Northeastern Division.

" The northeastern division extends from Garrett to
Roberts, a distance of fifty-two miles. We arrived at
Roberts late at night and started from there on our
inspection trip early in the morning. It was snowing
hard, and after the first ten miles of road the track was
so covered by snow that it was impossible to see
the ties; but a careful inspection of the ties 78
on the first ten miles, being the portion of the
road last built, showed that they were in as bad, if not
in worse condition than the ties on the northwestern
division. Ties are somewhat cheaper at this point, and
can probably be bought for forty cents apiece instead
of fifty, reducing the estimate for ties on this branch
from $8,000 to $6,400.

" At Trinity bridge two stone piers are positively
needed. The wooden piers to this bridge have been
carried away three times, and the remarks in regard to
the other bridges apply with equal force to this bridge
at Trinity river. The foundation for the piers here is 79
a difficult one, and the cost will come quite up to the
estimate.

" As I have said, this branch has no equipment of its
own. Mr. Swanson very properly wants a combination
coach for passengers and baggage.

" This branch is not in as good condition as the Northwestern
branch, owing to the fact that the foundation
here is mud instead of gravel, and that there is
no ballast within economical hauling distance.
In rainy weather this mud foundation becomes
very slippery, and the track slides. Mr. Swanson
tells me that it is almost impossible to keep the 80
road in good condition with the means at his command.
I can easily understand that this is the case; and, in
order to put that road in proper condition, ballast must
be brought to it in large quantities.

" The business over the road at present is so light
that I would not recommend any very large outlay for
this purpose; but it must be borne in mind that in
order to get that road in reasonable condition, a large
amount of money must be spent for ballast.

" Very truly,

" Charles C. Deming."

81 XVII.—Your petitioner has consulted with the holders of the bonds secured by the mortgages made to your petitioner as aforesaid respecting their views of the situation, and as to whether they were willing to have such a debt created as is proposed by the receivers, the lien of the same to take precedence to the lien of the mortgages and of the decree of foreclosure herein. It has been able to ascertain the wishes of parties representing an overwhelming majority in interest (probably four-fifths) of the said bonds, being all your
82 petitioner can reach. The holders of such majority are unwilling to consent that any such preferred debt shall in any way be created. On the contrary, they have instructed your petitioner to oppose the creation of any such indebtedness. These bondholders are ready to buy the property and put it in order at their own expense, but they are not willing to advance the money which seems to be necessary to put the road in a condition to fulfill its obligations to the public, so long as the foreclosure
83 decree remains unexecuted. Their reasons for taking this position, so far as they have been expressed to your petitioner, are to the effect that while they are willing, if the trustees were put in possession of the mortgaged railroads, or if they become themselves the owners of the railroad through a reorganized company, to provide a sufficient sum of money to put the road in good order and repair, nevertheless, they consider the course which has been pursued by the parties controlling, through their holdings of stock, the
84 organization of the Texas Central Company and of the Morgan Company, to be dictated simply by a desire to ruin the interest of the bondholders in the property, and to make it impossible for them to recover their indebtedness, and, if possible, to encumber the property with first liens to such an extent that the bondholders would have to abandon their interest in the same.

XVIII.—The parties who represent the large majority of these bondholders represent to your petitioner that this road is operated to a disadvantage in con-

sequence of its connection with the Houston and Texas 85
Central road. They state that a policy of separation from that road, and alliance with other railroad interests in Texas, would be greatly to the benefit of the Railroad Company. For this reason there is and there can be no harmonious feeling between these bondholders and the Receiver now in charge of the Texas Central road, because the same Receiver is also in charge of the Houston and Texas road, and is operating these roads together. Your petitioner greatly regrets this want of harmony, preventing, as it does, 86
any co-operation between the Receiver and the bondholders, but states it as a fact, and one which is very embarrassing in the present situation of affairs. The agents of a large majority of the bondholders have addressed to your petitioner a letter, which contains the following expressions of opinion:

"We have seen the report of Mr. Charles C. Deming, an expert on railroad matters, as to the present condition of the Texas Central Railroad of Texas, which furnishes ample evidence of the shameful neglect 87
of the past managers to maintain the road in a proper condition; and no matter how moderate may have been the net earnings of the road, they cannot have been so small as to prevent the road being in a far better condition had all the net earnings been expended on the road. Under such a condition of things it is evident that no lien precedent to the existing First Mortgage bonds should be created, as it would only serve to diminish the value of the First Mortgage bonds and enable the Houston and Texas Central Railroad to purchase the road at a lower price at the foreclosure sale, particularly if the sale be deferred 88
until the appeal to the United States Supreme Court at Washington can be reached on the regular docket and decided. If the sale could be had promptly by advancing the appeal on the docket, we are convinced that the First Mortgage bondholders would willingly purchase the road at the foreclosure sale, and at once place the whole of it in a proper condition so as to meet the requirements of the people that travel over it.

"We, for ourselves and as representatives of other large bondholders of the Texas Central Railroad, earnestly protest against the creation of any preferred

89 lien on said railroad, and desire that the Trustee of the First Mortgage oppose such lien in every possible way, and if necessary appeal to the Supreme Court from any order that the Circuit Court may make authorizing the creation of such lien, and stay the operation of such order by *supersedeas* bond."

Wherefore your petitioner prays that the Court will order that these causes be advanced in their order on the docket of this Court, and set down for hearing together, at an early day, to be fixed by the Court, 90 and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,

[SEAL.] By R. G. ROLSTON,
Prest.

HERBERT B. TURNER,
Solicitor.

91

92

STATE OF NEW YORK, } *ss.*: 93
Southern District of New York, }

I, Rosewell G. Rolston, being duly swern, depose and say, that I am the President of the Farmers' Loan and Trust Company, the plaintiff above named, and have been such President for a number of years past; that I have read the foregoing petition, and know the contents thereof, and that the same is true to my own knowlodge, except as to those matters therein stated to alleged on information and belief, and as to those matters I believe it to be true. 94

I further say that the reason why this verification is not made by the said plaintiff, is that it is a corporation, that I am an officer of the same, to wit, the President, and that my knowledge is derived from having taken my part in the transactions spoken of and otherwise, and my grounde of belief are information communicated to me by the agents of said corporation and others. I further say that the seal affixed to said petition is the corporate seal of said plaintiff, and was by me affixed to the same by authority of said corporation. 95

R. G. ROLSTON.

Sworn to before me this 1st }
day of February, 1888. }

JOHN MCCLURE,
Notary Public,
New York County.

96

97 STATE AND CITY OF NEW YORK, } ss.:
Southern District of New York, }

Charles C. Deming, being duly sworn, says that he is a resident of the City of New York, and has been engaged during the last six years in railroad construction and management, and has during that time been almost constantly engaged in connection with the construction, equipment and operation of railroads; that he is familiar with the necessities and requirements of railroad properties and has frequently made 98 inspections and examinations of railroads for the purpose of reporting on the same for the information and guidance of individuals and companies financially interested in such railroads and properties.

That at the request of Herbert B. Turner, Esq., of New York City, he made a careful examination of the railroad and property of the Texas Central Railway, and has made a full report of the same, which is incorporated in the petition of the Trustee, to which this 99 affidavit is annexed, and that said report is in all respects true and correct according to the best knowledge and information of deponent, and contains his true and impartial views of the condition and necessities of the Texas Central Railway.

CHARLES C. DEMING.

Sworn to and subscribed before me, }
this 1st day of February, 1888. }

100 JOHN MCCLURE,
Notary Public,
New York County.

SUPREME COURT OF THE UNITED STATES. 101

Morgan's Louisiana and Texas Railroad and Steamship Company,
Appellant,
vs. No. 969.
The Texas Central Railway Company and The Farmers' Loan and Trust Company, 102
Respondent.

The Texas Central Railway Company,
Appellant,
vs.
Morgan's Louisiana and Texas Railroad and Steamship Company, and The Farmers' Loan and Trust Company, No. 974. 103
Respondent.

Brief in support of said Motion to Advance these Causes, etc.

104 For a statement of facts, reference is made to the petition herewith filed. These appeals are both taken from the same decree.

It is not claimed that the mere fact that an appeal is taken for delay is of itself sufficient to induce the Court to advance a cause. Nevertheless, the fact that the appeals in these causes evidently are taken for delay is a circumstance to be considered in connection with others.

105 The original complainant, Morgan's Louisiana and Texas Railroad and Steamship Company, claimed in its original bill that its debt for money advanced to the Railway Company was entitled to preference and should be first paid out of the proceeds of the sale. It admitted the mortgage debt for which the decree has been taken. It even asked for a sale of the road. The Court decided against it simply on the question of priority. It held that an indebtedness for money loaned to an amount of six hundred thousand dollars, running
106 back over a series of years, the borrowing company and the loaning company being owned and controlled in the same interest, was entitled to no preference over the bonded debt. It seems scarcely necessary to argue against such a decision. Moreover, it simply affected the order of payment, adjudging that the bondholders should be paid first and the Morgan Company second. Yet from a decree like this the Morgan Company has appealed and stayed all proceedings, even the sale of the property. It will not help the
107 bondholders, or the people of Texas, who are dependent on this road, to have the supersedeas vacated; for, if that were done, the purchaser would be obliged to deposit money enough to secure the Morgan Company in the event of a possible reversal of the Court below on the question of order of payment. The bondholders propose to buy the property, whatever there is left of it, and should not be called upon to pay a large sum of money before they can obtain possession. Our only relief, therefore, is to move to advance the causes.

108

The appeal of the Texas Central it is difficult to understand, inasmuch as the Court will see by examining the record that the Texas Central has admitted all the allegations of the complainant necessary to sustain its right to the decree.

Evidently, then, the appeals are without merit, and the judgments must be affirmed when the causes are heard.

It is claimed that the petition shows a deliberate 109
effort on the part of those who control the associated companies mentioned therein to ruin the bondholders and destroy their property by simply availing themselves of the long delay that must ensue before the cause can be reached on the docket of this Court. We do not claim that this alone entitles the causes to a preference, but it should be considered.

We ask the Court to advance these causes from considerations of public interest. A glance at the map
will show that this railroad extends some two hundred 110
and thirty miles in one direction and over fifty miles in another into large sections of Texas. Communities are built up along the line, and large sections of farming country are dependent upon this road for access to the main portions of the State. Over this road must go all their cotton and other produce which they send to market. They cannot reach any other means of communication. As it is, these people are dependent upon a road whose condition is dangerous to life, and
which the bondholders are ready to take and put in 111
order, but which they will not consent shall be improved by the creation of a preferred debt.

But it may be asked, why does not the Trustee consent to the creation of a preferred debt with which to make the necessary repairs? This question is answered by the final paragraphs of the petition. The bondholders will not permit the Trustee to do so; they insist that the Trustee shall appeal from any
order creating such preferred debt, and stay its opera- 112
tion by *supersedeas*. If the Trustee fails to do so they will themselves pursue that course. So the public interests will suffer.

A motion such as that now before the Court is purely addressed to its discretion (*Ward* vs. *State of Maryland*, 12 Wall., 163). A case very similar to this came before the Court of Appeals of the State of New York in June, 1887. It was the case of the *Metropolitan Trust Company of the City of New York* vs. *The Tonawanda Valley and Cuba Railroad Company* A decree

113 of foreclosure and sale of the railroad had been taken, and from it the trustee of a subsequent mortgage appealed. It was shown to the Court on motion that the condition of the road was such that it needed great repairs, and could not and did not in its then present condition pay operating expenses; and the Court advanced the cause, setting it down for argument at an early day, and decided it at once. This case is not reported, but as the subscriber was counsel for the moving party, he is able to state the facts from his 114 own personal knowledge.

The Trustee respectfully represents to the Court that under circumstances like these the motion to advance these causes should be granted, and the causes heard together at an early day.

HERBERT B. TURNER,
Of Counsel.

Notice.

115 You are hereby notified that the foregoing are copies of the motion to advance the above-entitled causes on the docket, of the brief in support of said motion, and of the petition of the trustee; and that the said motion will be called up for argument and submitted before the Supreme Court of the United States, at Washington, in the District of Columbia, on the 13th day of February, 1888, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

116 HERBERT B. TURNER,
Of Counsel for the
Farmers' Loan and Trust Company.

To

Morgan's Louisiana and Texas Railroad and Steamship Company and Farrar & Kruttschnitt, Esqs., Defendant's Solicitors and Counsel, and to

The Texas Central Railway Company and Charles H. Tweed, Esq., its Solicitor and Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 55.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY,
Appellant,
vs.
THE TEXAS CENTRAL RAILWAY COMPANY, THE
FARMERS' LOAN AND TRUST COMPANY, Trustee,
Appellee, et al.

NO. 59.

THE TEXAS CENTRAL RAILWAY COMPANY,
Appellant,
vs.
MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY, THE FARMERS' LOAN AND
TRUST COMPANY, Trustee,
Appellee, et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR THE FARMERS' LOAN AND TRUST COMPANY, APPELLEE.

HERBERT B. TURNER,
Of Counsel.

Supreme Court of the United States.

Morgan's Louisiana and Texas Railroad and Steamship Company,
Appellant,

vs.

No. 55.

The Texas Central Railway Company, The Farmers' Loan and Trust Company, Trustee,
Appellee,
et al.

The Texas Central Rrailway Company,
Appellant,

vs.

No. 59.

Morgan's Louisiana and Texas Railroad and Steamship Company, The Farmers' Loan and Trust Company, Trustee,
Appellee,
et al.

Brief for the Appellee, The Farmers' Loan and Trust Company.

These appeals are taken by two corporations, the stock of which is owned and controlled in the same interest (fols. 225, 226), from a decree, rendered April 12th, 1887, by the United States Circuit Court for the Northern District of Texas, ordering the sale of the Texas Central Railway and the property of that Company, and foreclosing two trust deeds made to the appellee, The Farmers' Loan and Trust Company, to secure bonds. The decree finds a certain claim of the original complaint, Morgan's Louisina and Texas Railroad and Steamship Company, for money loaned, to be in all respects subsidiary and junior to the liens of the mortgages (fol. 382); and as there is considerable land not covered by the mortgages, it is decreed that if the proceeds of the sale to be made should not be sufficient to satisfy the claim of the Trust Company primarily, and that of the Morgan Company secondarily, then the Trust Company and the Morgan Company should have judgments for the balance due them respectively, and execution therefor (fols. 386–7).

The litigation was commenced in April, 1885, by the filing of a bill by Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation, usually known as the Morgan Company, for the appointment of a Receiver, and the sale of the property of the Texas Central Railway Company, to enforce an alleged lien (fol. 3).

The incorporation of the complainant was obtained by Charles Morgan for the purpose of consolidating under one management the various railway and steamship lines owned by him (fol. 225). He owned the stock of the complainant, and the complainant owned and still owns a majority of the stock of the Houston and Texas Central Railway Company (fol. 226).

This last-named company is not a party hereto, being a distinct corporation from the defendant, the Texas Central, which was not incorporated until later.

It naturally followed from the fact that the Morgan Company held the stock of the Houston and Texas Central, that an intimate business connection was formed between them. They were practically under the same control. The result was that the expiration of seven or eight years found the Morgan Company very wealthy and the Houston and Texas Central bankrupt.

Not long after the organization of the Morgan Company the parties in interest desired to extend the lines of the Houston and Texas Central. As legal impediments stood in their way, they were compelled to form a new corporation for that purpose. This was the origin of the defendant, the Texas Central Railway Company, which was incorporated in May, 1879, and amended its charter in May, 1881. It was authorized at first to build and operate a railroad from Ross Station, in McLennon County, to the centre of Eastland County, a distance of 150 miles or more, and subsequently, by its amended charter, to continue that line to the north boundary of Texas, and also to construct other roads. The parties in interest built, as the Texas Central, a part of the lines which they were thus authorized to build, namely, one road from Ross to Albany, a distance of about 175 miles, and another from Garrett, in Ellis County, to Roberts, in Hunt County, a distance of about 52 miles. These two roads do not come within 100 miles of each other by rail. The first connects at Ross with what is known as the Waco Division of the Houston and Texas Central, which division connects at Bremond with the main line, and the other connects with the main line at Garrett, some distance north of Bremond.

The Texas Central was incorporated by the Morgan Company and the Houston and Texas Central, the former subscribing for 750 shares and the latter for 1250 shares, while the remaining fifty-three shares were placed in the names of certain officers of the Morgan Company, to enable them to act as directors of the new corporation. There has been substantially no change in the ownership of the stock since that time (fol. 203).

The Texas Central, before the amendment of its charter, built the road from Ross to Cisco, and made a mortgage to the Farmer's Loan and Trust Company, appellee, September 15, 1879, covering that line. After the amendment of the charter, it made another mortgage to the same trustee dated May 16, 1881, covering the entire property, and being, therefore, a first lien on the line from Cisco to Albany and on the line from Garrett to Roberts, and a second lien on the line from Ross to Cisco. The entire property was thus bonded to the extent of $15,000 a mile. The bonds were one thousand dollar seven per cent. bonds. Under the original mortgage bonds to the amount of $2,145,000 were issued, and under the subsequent mortgage bonds to the amount of $1,245,000 were issued. It was intended that additional bonds should be issued under the later mortgage to take up and cancel the previous issue that there might be one first lien upon the entire property to the extent of $15,000 a mile, but this project was never carried out (fol. 52).

The bonds of the Houston and Texas Central were deemed in moneyed circles an excellent investment and commanded a premium in the market. Ready purchasers were therefore found for the bonds of the Texas Central. They sold at about par. The roads had the same fiscal agent who paid the coupons of both (fol. 233).

The management of the Texas Central was, during its entire existence, in the hands of the same officers and directors who managed the Houston and Texas

Central (fol. 225). All this is set up in the original bill (fol. 19). The officers derived their compensation from the latter company. All the receipts for freight and passengers of the Texas Central were first paid to the Houston and Texas Central, and then were paid over by it to the treasurer of both companies as treasurer of the Texas Central (fol. 229). Whatever deficits of funds on the part of the Texas Central occurred prior to the default were made up by the Houston and Texas Central. The latter company received and disbursed everything. No dividend on stock was ever declared. The Texas Central was in all respects wholly dependent upon and subservient to the Houston and Texas Central (fols. 218, 229.)

This was the situation before the bankruptcy of the Houston and Texas Central. Stripped of legal technicalities it was simply this: Certain capitalists had obtained control of these railroads and of the steamship lines of the Morgan Company, they had operated them according to their own will, and divided the proceeds of such operation among the corporate interests in such proportions as they deemed proper. The capital on which they carried on their operations had, to a large extent, if not wholly, been derived from persons who had money to invest—capitalists in some instances no doubt, but in very many cases persons of moderate means, seeking for a safe place in which to put a little money. The result of these operations was the appointment of Receivers of the Houston and Texas Central and of the Texas Central; and when the bondholders seek to enforce the poor security which the mortgages give them, they find these same persons who have used up their money and mismanaged their property, coming forward to present, on their own behalf, what they call preferred claims, and delaying the assertion of the bondholders' rights and the delivery over to them of the property (on the purchase which they must make on the judicial sale), by the lingering agony of an appeal.

The Houston and Texas Central Railway Company was thrown into the hands of Receivers in February, 1885, under a bill filed by the Southern Development Company, in the United States Circuit Court for the Eastern District of Texas. The Southern Development Company is a California corporation, owning the capital stock of the Morgan Company, which latter company practically owns the stock of the Houston and Texas Central, and of the Texas Central, as we have seen (fol. 235). When bills are filed or appeals taken in the name of any of these corporations, we know that it is done in the same interest. Two months later, early in April, 1885, the litigation now before the Court for review was begun by the filing of the original bill herein against the Texas Central; but this time it was the Morgan Company that claimed the preference debt, and asked for Receivers, suggesting (however), the same persons for the position who had previously been appointed Receivers of the Houston and Texas Central.

The story told by the complainants in their bill—the same parties, it will be remembered, who have had charge of these corporate interests since they acquired the stock of the Morgan Company—is substantially as follows:

The bill (fol. 3) sets up the incorporation of the railway company, its objects and purposes, that it has built and owns 228 miles of railway (fol. 5), that it owns town lots and equipment, that it made a mortgage to the Farmers Loan and Trust Company, September 15, 1879 (fol. 6) and issued bonds to the amount of $2,145,000 under the same (fol. 8), and that, when its charter was amended and it was authorized to build an extension and branch line, it made another mortgage, May 16, 1881, for the purpose of so building and also to exchange the other bonds, and issued bonds to the amount of $1,254,000, issuing none for exchange purposes, (fol. 11); that in October, 1884, it made a subsequent mortgage to the Metropolitan Trust Company of the City of New York, which it had not been able to record in all the counties in which it had a right to build, and that trustee, therefore, refused to certify them until the recording is perfected; that the Texas Central, being embarrassed and already indebted to the Houston and Texas Central Railroad Company in a large amount (fol. 14), obtained further advances from that Company, making a total indebtedness from the Texas Central to the Houston and Texas Central of $761,992.04; and that for the security of said advances the Texas Central made, November 1, 1884, its sixteen promissory demand notes, pledging for the same its entire issue of general mortgage bonds, secured by the mortgage to the Metropolitan Company, being $2,286,000; that demand had been made for the notes, but the Texas Central refused to pay, and in order to pledge the bonds not yet certified by the Metropolitan, the Texas Central made and issued to the Houston and Texas Central its certificates, obligating itself to deliver said bonds as soon as they were executed and signed by the Trustee (fol. 15); that the Houston and Texas Central had pledged the notes and certificates to the complainant, the Morgan Company, as part security for an indebtedness of over $1,000,000, and that complainant holds and owns the same; that the certificates are an equitable lien on the property described in the Metropolitan mortgage; that the sums advanced (fol. 16) by the Houston and Texas Central to the Texas Central were so advanced at various times for taxes, fuel, supplies, labor, repairs, operating and managing expenses, proper equipment and useful improvements and other necessary expenditures by which the railway has been kept in safe running order, its business and *importance* increased and thereby rendered more beneficial to the bondholders and other creditors, and that said sums so advanced amount to $762,000 or thereabouts; that said indebtedness was contracted by the defendant in consideration of its promise to pay the same out of the earnings of the railway, and that said indebtedness was and is, in equity and good conscience, a first lien and charge upon the income and property of said railway; but that the Railway Company, instead of paying the debt from earnings, had failed to pay the same or any part; that, *as plaintiff is informed and believes*, the Railway Company had used at least $500,000 of said earnings during 1882, 1883 and 1884, for payment of first mortgage coupons (fol. 17); that the certificates will be of no value unless the relief is granted, that an effort to foreclose the pledge will be fruitless, that the Railway Company has no property on which to levy except the mortgaged properties, and execution would be fruitless, that it is embarrassed (fol. 18), &c., that it will default in its bonded interest, and present earnings are not equal to operating expenses; that it was built, relying on business connections with the Houston and Texas Central (fol. 19); that its business has been carried on by the officials of the Houston and Texas Central; that they have been operated together; that the Houston and Texas Central has been placed in the hands of Receivers, and so the Texas Central is deprived of its operating officials, and the benefit of the harmonious business relations; that the "*interdependence*" of the two railways has been such that it is to the vital interest of both that it should be maintained; and that the Houston and Texas Central owns over one-third of the stock of the Texas Central, and is obligated for the debt. Then follow detailed statements as to an alleged necessity that the two roads should be operated together.

The prayer (fol. 24) is for the appointment of Receivers to operate and sell the property, &c., and for the payment of the plaintiffs' claims, &c. *To this original bill neither mortgage trustee was made party.*

Let us pause a moment that we may appreciate the situation.

Certain gentlemen own the Morgan line of steamships and railways and the Houston and Texas Central lines of railway; they have controlled and operated these corporations as they pleased, without any question as to their stewardship on the part of the owners of the bonds of the Houston and Texas Central for a number of years; nay, more, as they paid and continued to pay the interest, it may be assumed that if any right existed on the part of any bondholder to question their stewardship and to demand an accounting, it would have been a right most difficult to exercise. Being in this position these gentlemen have extended their lines of railway in the name of the Texas Central with money borrowed on the faith of the old name of Central, and by reason of the fact that the interest on the bonds of the Houston and Texas Central had always been paid with promptness. They have gone on for several years paying interest on these new Texas Central bonds, and now, when it is a desirable thing, in their judgment, to improve these railroad properties, to lay down steel rails, to put up fences, to build stone bridges and generally to put the road in first-class condition, and also to procure new equipment, and to reduce the interest all of which can be done by means of a receivership and one of those expected compromises which follow such a default, then these same capitalists, who control these properties as holders of stock, throw both corporations into the hands of the same Receivers, and say that they have loaned themselves moneys which have been used in operating this Texas Central road, and paying interest, and therefore have a prior lien to that of the astonished and deluded bondholders.

It will, of course, be remembered that the very fact that interest is paid gives to the bonds of a railroad their market value. It is not assumed or suspected that the interest is paid with borrowed money. The payment of interest of the Texas Central made these bonds saleable in Wall street at above par, and caused many of the present holders to buy them as a safe and permanent investment. It is not proposed by the complainant to charge the refunding of the back interest against those who received it, but against those who, by reason of the fact that it was paid, were induced to invest in the bonds at a very high price.

The circumstances attending the appointment of the Receivers were somewhat peculiar, but are readily explained when we remember the identity of the stockholders who control the complainant and the other associated companies of which we have spoken. The application made by the complainant, the Morgan Company, for the appointment of Receivers of the Texas Central, so far from being resisted in any way by the officers of the latter company, seems to have been favored by them to the utmost of their ability. The moving parties, whose allegations as to insolvency and indebtedness are made in the most general terms (fol. 18), were not called upon by the then defendants to give any proof of their assertions. Mr. Waldo, the Vice-President of the Texas Central (the president being absent) does not consider it his duty to make any opposition, *or even to* *notify the bondholders' trustee.* On the contrary he voluntarily makes an affidavit to aid in carrying out the course proposed (fol. 73). He says that he has read the bill; that its averments are substantially true; and "that he believes it to be for the interest of all parties concerned that a Receiver should be appointed to the said Texas Central Railway Company, and that the present receivership of the Houston and Texas Central Railway Company should be extended over the Texas Central Railway Company, as the latter company is not able to support the costs and expenses of an independent receivership, and as an independent receivership would interfere with the harmonious operating relations of the Houston and Texas Central Railway Company." Mr. Cave, the treasurer, and Mr. Swanson, the general transportation manager, make affidavits identical in form with that of Mr. Waldo (fols. 74, 75), and Mr. Waldo, who makes this affidavit on April 2d, is the same officer of the company on whom notice is served on April 3d at Houston, Texas, that on the following day, at ten o'clock in the morning, at New Orleans (360 miles off) an application will be made for the appointment of a Receiver (fol. 69). Moreover, the appearance of the defendant company by its solicitors is filed on the 4th, by which it admits service on the previous day, and submits the motion for such action of the Court as may seem just and equitable (fol. 72). We are not surprised to learn that these affiants are also officers of the Houston and Texas Central.

Thereupon, on April 4, 1885, at New Orleans, in pursuance of these notices and papers, the Circuit Judge, having no knowledge of the peculiar facts and of the identity of interest, appoints the same gentlemen who had already been appointed and were then acting as Receivers of the Houston and Texas Central to be Receivers of the Texas Central (fols. 77 *et seq.*).

Let us pause again to consider the facts. Nearly four millions of dollars of Texas Central bonds are held by parties represented by the trustee supposed to be secured by recorded mortgages on the Texas Central roads, set up at large in the original and supplemental bill of the Morgan Company, and unquestioned as to validity and amount by any one. The property, it is admitted, yields little or no beneficial income. On the one hand appears before the Court the Morgan Company, owned by the Southern Development Company, whose stock is owned by certain New York and California capitalists, and asks for a Receiver and the enforcement of an alleged preferred lien. On the other hand stands the Texas Central, owned by the Houston and Texas Central and the Morgan Company, admitting that it owes the debt, and consenting that the Morgan Company have possession of the property and any other relief that it may wish. And between these agreeing parties stands the Houston and Texas Central, owned by the Morgan Company, ready to furnish the Receivers to hold and operate the property for the benefit of "all parties concerned." The only persons conspicuous by absence are the real owners of the property. The trustee, the representative of the large sums of money which had built the roads, was not then a party defendant to the cause, and had no notification of this momentous proceeding.

Later, May 14, 1885, the complainant filed an amended and supplemental bill, alleging, on information and belief, that it was the intention of the trustee to foreclose and sell before the complainant could collect its claim (fol. 88), and making the Farmers' Loan and Trust Company party defendant; and it prays for an accounting, that its own claim be declared a first lien on the earnings and all the railroad property superior to the mortgages (fol. 91), that if the earnings are not sufficient to pay the claim, a sale be had, &c. (fol. 92), and for other relief.

The answer of the Texas Central (fol. 95), filed July 1, 1885, admits all the facts, even admitting specially that the indebtedness was contracted upon "the consideration and promise of defendant to pay the same out of its earnings," and also that it did pay *out of its earnings and the moneys so advanced to it*, the coupons on its first mortgage bonds in amount about the same as stated in the bill (fol. 100). It is curious to notice that on the trial neither of these facts ~~were~~ was proved.

The answer of the Farmers' Loan and Trust Company (fol. 112), puts the complainant to its proof of all matters except those referring to the creation of its trust, expressly denying the allegations on which priority of lien is claimed, and alleges (fol. 117) the identity of interest of the Morgan Company, the Houston and Texas Central and the Texas Central, they being all owned and controlled by the same persons (fol. 120); and then proceeds as follows:

> "As to the interdependence between the defendant railway company and the Houston and Texas Central Railway Company, this defendant says that there has been on the part of the defendant, the Texas Central Railway Company, throughout its entire existence, in every possible way, an utter and entire dependence upon and subserviency to the complainant in this suit, and the interests represented by this complainant; and this defendant is advised and therefore alleges that all the proceedings, acts and doings of the defendant, The Texas Central Railway Company, from its organization, are in fact and in law those of the complainant herein, and are to be equitably imputed to the said complainant."

The Farmers' Loan and Trust Company filed a cross-bill, July 1, 1886, for the foreclosure of the mortgage made to it (fols. 136 *et seq.*)

The final decree (fols. 366 *et seq.*) was rendered April 11, 1887. The Court finds the insolvency of the Texas Central (fol. 379), the amounts due on the mortgage, aggregating $4,015,528.98, that the Trust Company is entitled to a judgment of foreclosure and sale, and that the claim of the Morgan Company is junior to that of the mortgages (fol. 382). All the mortgaged property is ordered to be sold as one parcel to pay the Trust Company's mortgages (fol. 384), and if there be a deficiency, then the Morgan Company and the Trust Company are to have judgments for the balances due them respectively and execution therefor, etc. (fol. 387).

The only question arising on the trial of the cause in the Circuit Court was as to the rank of the Morgan Company's debt, and whether priority should be accorded to it over the secured claims of the bondholders. Nevertheless, although no question had been made by either party as to the amount due or as to the obligation of the defendant Railroad Company on the bonds issued under these mortgages, an obligation which was alleged by the Morgan Company in its original bill and expressly admitted by the Railroad Company in its answer, several and separate appeals were taken to this Court from the said decree and from each and every part thereof by the original complainant, the Morgan Company, and by the defendant, the Texas Central, and *supersedeas* bonds were given by these Companies on such appeals in the sum of three hundred thousand dollars each. In this way the parties interested, being the same persons who had placed these railroads in the hands of Receivers, succeeded in staying the execution of the decree of foreclosure and sale, although their contention before the Court below had simply affected the order in which the proceeds of the sale should be distributed, and although they had themselves in the original bill filed by the Morgan Company prayed, as above stated, for a sale of all the Railway Company's property.

POINTS.

FIRST.

The debt of the original complainant is not of such a nature as to be entitled to any preference in equity to the lien of the mortgages.

The allegations of the bill respecting the nature of this debt are as follows:

"XIV.—And your orator, further complaining, says that the sums of money so advanced by said Houston & Texas Railway Company to said Texas Central Railway Company were advanced to said Texas Central Railway Company at various times for taxes, fuel, supplies, labor, repairs, operating and managing expenses, proper equipment and useful improvements and other necessary expenditures by which defendant's railway has been kept in safe running order, its business and importance increased, and thereby rendered more beneficial to the bondholders under the various mortgages hereinbefore described, and to all other creditors of said company; that the sums so advanced amount as aforesaid to $762,000, or thereabouts.

"XV.—Your orator further avers that the said indebtedness was contracted by the defendant upon the consideration of its promise to pay the same out of the earnings of its railway, and that the said indebtedness was and is, in equity and good conscience, a first lien and charge upon the income and property of said railway, but that the said defendant, instead of paying the debt so justly due to your orator out of the earnings of said railway, has utterly failed to pay the same or any part thereof: and that your orator is informed and believes, and so charges, that the said defendant has used a large amount, at least five hundred thousand dollars, of said earnings during the years 1882, 1883 and 1884, for the payment of coupons upon its first mortgage bonds hereinabove described, although the holders of said coupons were only entitled to receive payments thereof after the defendant had paid your orator the amounts advanced and expended in the manner and for the purposes hereinabove set forth."

Abbreviated, the allegations are to the effect that

(1.) Sums of money were advanced or loans made at various times.

(2.) That they were advanced to the Texas Central to be used for taxes, operating expenses, equipment, improvements and other necessary expenditures.

(3.) That by means of the advances the defendant's railway has been kept in safe running order, its business, &c., increased.

(4.) That the loans were made in consideration of a promise of the Railway Company to pay the same out of its earnings, which it failed to do.

(5.) That the railroad had used a large amount of its earnings in 1882, 1883 and 1884 for the payment of first mortgage coupons, although the holders of the coupons were only entitled to receive payment after the Railroad Company had paid the loans.

So much for the allegations. Now let us see how much of all this is proved.

Mr. Cave, who was Treasurer of both the Texas Central and Houston and Texas Central (fol. 209), testifies as follows:

"Q. Do you know for what purpose those notes were given by the Texas Central Railway Company to the Houston & Texas Central Railway Company?

"A. They were issued in settlement of the indebtedness of the Texas Central Railway Company to the Houston & Texas Central Railway Company.

"Q. How did that indebtedness arise?

"A. It arose for cash advances and payments made by the Houston & Texas Central Railway Company for the benefit of the Texas Central Railway Company.

"Q. Payments for what purpose?

"A. Moneys advanced to the Texas Central Railway Company in connection with the operation of its road.

"Q. (Exhibiting paper to witness.) I ask you to look at this paper, which purports to be a statement of the gross revenues, operating expenses, taxes and interest charges of the Texas Central Railway Company from the time that it commenced operations, covering the years 1880, '81, '82, '83, and up to September 30, 1884, and ask you to state what you know about the facts which therein appear, of your own knowledge.

"A. From my general knowledge and recollection of the affairs of the Texas Central Railway Company this represents the payments made for the various accounts named therein, without being satisfied that the figures are as shown on the books, but in round amounts are as within my knowledge and recollection, representing the gross earnings, operating expenses, taxes, and interest on bonded debt.

"Q. Do you, as treasurer of the Texas Central Railway Company, know whether the interest charges were paid for the year 1880?

"A. All interest charges of the Texas Central Railway Company were paid up to the time when it defaulted on its interest.

"Q. When did it default on its interest?

"A. It defaulted on its interest in 1885; about , 1885.

"Q. Prior to that default the interest charges were all paid?

"A. The interest charges were all paid; coupons paid. I recognize the statement before me as prepared by Mr. Hall, secretary of the company.

"Q. At what date was the account between the Houston & Texas Central Railway Company and the Texas Central Railway Company adjusted and closed?

"A. About the last of October, 1884, my recollection is.

"Q. What would have been the condition of the Texas Central Railway Company if the advances and payments which those notes represent had not been made?

"A. I don't think the road could have been carried on.

"Q. Why?

"A. Because the amount of gross earnings would have left a deficit upon its operating expenses and fixed charges—taxes—that would have compelled it to have practically stopped.

"Q. Was there any year during the years 1880, '81, '82, '83, and up to September, 1884, when that company earned enough to pay its operating expenses and fixed charges—I mean including in that taxes?

"A. No, sir.

"Q. How were these funds that were advanced by the Houston & Texas Central Railway Company to the Texas Central Railway Company used by that company?

"A. They were used in paying its operating expenses-indebtedness accruing for material and supplies, for maintenance, and such things as had to be done to improve or keep the property up in proper condition, and there may have been some portion of it that was necessarily applied to the maintenance of its security.

Q. "You mean by that the payment of interest on its bonds?

"A. Some of that money necessarily for that, because whatever money was used by the company out of its own gross earnings from its general business for the payment of interest on its bonded debt necessarily left a deficit in its operating expenses and maintenance which had to be covered by advances and money obtained."

On cross-examination he testifies as follows:

"Q. Was the road entirely completed out of these bonds, or were there advances made by the Houston & Texas Central Railway Company to help build the road?

"A. To the best of my recollection, the bonds—the amount received from the sale of the bonds—was sufficient, and the stock, to provide for the actual construction of the road; but after the road was commenced to be operated there was, as there most always is in newly constructed roads, a considerable amount of work to be done.

"Q. In order to complete it and put in good order?

"A. In order, as the saying is, 'to get the road up.' It is very seldom that a road that is newly constructed, when operation is commenced, that its condition is such as not to require any further work, and that is often a considerable charge upon its revenues.

"Q. Well, where did it get the money to do that?

"A. It commenced borrowing money of the Houston & Texas Central Railway Company. These advances were made.

"Q From the beginning?

"A. No, not entirely from the beginning. During the process of construction the proceeds of the sales of the bonds went into the construction of the road, but the road was operated, you may say, almost from the time when its operation commenced. It was operated and practically a part of the Houston & Texas Central Railroad. The Houston & Texas Central Railway Company collected its revenues and accounts. The money was disbursed from those moneys that were collected, and only as the deficit arose and increased those advances were made and had to be made by the Houston & Texas Central Railway Company, and if they had not been made the railroad could not have been run sometimes; it would have to face debts it could not pay. It was practically operated as a division of the Houston & Texas Central Railroad. The officers of the Houston & Texas Central Railway Company acted as officers of the Texas Central Railway Company, and they received no salaries. Its revenues came in and went into accounts, and then those accounts went on to the books of the Texas Central Railway Company, where matters were not kept direct.

"Q. Its revenues were received in the first place by the Houston & Texas Central Railway Company?

"A. Yes, sir; freight revenues—that is, earnings—went into the books of the Houston & Texas Central Railway Company.

"Q. When it got behind in any way—payment of interest or for operating expenses or anything else—when it got into debt who determined what should be paid?

"A. The executive officers of the Houston & Texas Central Railway Company advanced the money. They were authorized to advance it, and the debt was paid, the money was paid over to the Texas Central Railway Company, and its debts were paid and receipts taken &c. As the Houston & Texas Central Railway Company collected all its earnings, why, whenever it was short it naturally turned in and it received help, and that is the way this balance of seven hundred and sixty-one thousand, nearly seven hundred and sixty-two thousand dollars, arose.

"Q. Well, that is the balance upon a running account commencing from its earliest operations down to that time?

"A. That is the balance of running account commencing about from the time the road commenced to be operated as a road. I think that account was adjusted.

"Q. Were there different statements of accounts from time to time made up?

"A. I don't think that the account was closed, but as the officers of both companies at all times were familiar with both accounts, the account was at all times understood, within their knowledge, and when the settlement was made upon which these notes were issued the account was brought down to date, interest calculated by the auditor of the Houston & Texas Central Railway Company understood and acknowleged, and a balance of interest struck, and the balance found to be, as stated, about $762,000.

"Q. How was the account made up and how was interest computed? Were there rests from period to period annually, or how about that?

"A. My recollection is that interest was computed on both sides. There was a continual running account.

"Q. That is, the interest was calculated on every credit item and every debit item and brought down?

"A. Yes, sir; the balance of interest is the interest that was charged.

By Mr. Farrar:

"Q. That is interest on balances?

By Judge Ballinger:

"Q. That is what I want to know. This account was made up in 1884. Now, suppose, for instance, in 1880 there was a debit item and credit item, did you calculate interest on each from 1880 to 1884, four years' interest, or were there calculations made for periods and then balances struck?

"A. I did not make the interest calculation. My recollection is—

"Q. Who paid the interest on the bonds? Who furnished the money to pay the interest on the bonds?

"A. The Texas Central Railway Company when the Texas Central Railway Company had funds, balances, &c.

"Q. Had any balance on its books?

"A. Yes, sir. Why, it did not have to call on the Houston & Texas Central Railway Company for it, and whenever it did not have it, as in the matter of interest or as in other matters, whatever balance was needed was supplied, but the Texas Central Railway Company paid its own coupons. They were paid by John J. Cisco & Son in New York upon separate account. He was the fiscal agent.

"Q. Of both roads?

"A. Yes, sir; so understood and acknowledged.

"Q. And he was the party that paid the coupons?

"A. He paid the coupons after advertisement or notice was given. They were paid as usual.

"Q. The accruing funds, the income of the Central Company, was there any special use of its own funds, of its own earnings, towards paying running expenses rather than interest, or towards paying interest rather than running expenses, or was that all a matter of running account?

"A. It was all in one account, so far as the account of the Houston & Texas Railway Company was concerned, and whether the advances were made for one purpose or another they were charged so much cash; but the Texas Central Railway Company, of course, took cognizance of what it was used for.

"Q. So that whenever it was behindhand on its current indebtedness and needed money, the Houston & Texas Central Railway Company paid it, and when it came to pay interest and did not have funds, the Houston & Texas Central Railway Company paid it?

"A. The Houston & Texas Central Railway Company let it have the money." (Fols. 228 *et seq.*)

The Secretary was then put on the stand (fol. 234.) He produced a statement showing the yearly deficit in the running of the road from the year 1881 to 1884, inclusive (fol. 271).

This is all the testimony given on the subject.

The whole transaction is purely and simply a loan of money. The Treasurer of the Texas Central received the income of the road, and when necessary, he borrowed money. All went into a common fund from which expenses were paid.

The allegations that these loans were made and moneys advanced *to be used* for taxes, operating expenses, &c., is not proved.

The alleged promise of the Texas Central to pay these loans out of its earnings has not been proved.

No Court, it is submitted, has ever given priority to any such claim for money loaned. This Court has decided against such claims.

In *Penn* vs. *Calhoun* (121 U. S., 251,) a railroad foreclosure, a bank which had loaned money was held to be a general creditor only.

See also:

> *Millenburger* vs. *Logansport, etc., R. R. Co.*, 106 U. S., 286.

In *Union Trust Co* vs. *Illinois Midland Railway Co.* (117 U. S., 434), money loaned to the Receiver and used in operating the road was held not entitled to a preference, as the Court below had not authorized the Receiver to borrow it.

In *Porter* vs. *Bessemer Steel Company* (120 U. S., 649, 122 U. S., 267), claims for construction of the road were held to be simple contract debts, and in *Kneeland* vs. *The American Loan and Trust Company* (136 U. S., 89), this Court took occasion to consider this entire subject of preferred liens in an opinion which has impressed itself widely upon the profession as a peculiarly strong assertion of the law, holding that when, at the instance of a general creditor, a Receiver of a railroad and its rolling-stock was appointed, and a portion of said rolling-stock had been leased to the company with the right of purchase, the claim for rent was not entitled to priority over mortgage bond-holders on the sale of the road under foreclosure.

In that case the Receiver was first appointed August 1, 1883, under a creditor's bill. The mortgage trustees were made parties. They entered their appearance and, the trustees neither objecting nor consenting, the Receiver was appointed. Such receivership continued until December 1, 1883, when foreclosure bills were filed by the Trustees and a Receiver was appointed thereunder. This Court, after stating that the first inquiry presented was whether rentals for such period were properly given priority over the mortgage debts, and answering that question in the negative, went on to say:

"The appointment of a Receiver vests in the Court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a Receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a Court appointing a Receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a Court appoints a Receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this Court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the Chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens" (pp. 97, 98).

In the case of *the St. Louis, Alton and Terre Haute Railroad Co.* vs. *Cleveland, Columbus, Cincinnati and Indianapolis Railroad Co.* (125 U. S., 658), questions arose respecting the gross earnings, it being claimed that they should be applied to operating expenses until every operating expense had been fully paid, and that any payments made to bondholders from such earnings should be considered as diversion. The Court referred to the rule laid down in the case of *Burnham* vs. *Bowen*, to the effect that if current earnings were used for the benefit of mortgage creditors before current expenses were paid, the mortgage security was chargeable in equity with the restoration of the fund which had been thus improperly applied to their use. But the Court goes on to say that, where the claim is of such a character as to bring it within that rule, it must still be shown that the arrearage due on account thereof has arisen by the diversion and misappropriation to the use and benefit of the mortgage bondholders, of the fund that ought to have been applied to the payment of such arrearage.

The diversion, it was claimed, was shown by an exhibit, which in tabular form contained a statement of the earnings, expenses, rentals and interest from the date of the commencement of operations in 1867 to May 23, 1882. That statement showed as follows: Gross earnings $26,868,252.31; operating expenses, including taxes, $19,417,078.26; leaving as net earnings $7,451,174.05. During the same period the amount of rental paid for leased lines was $6,464,869.19, and during the same period interest paid on bonds, $2,234,396.62; showing as the result of the operation for the entire period a deficit of $1,248,091.76. It thus appeared that the payments made on account of the various items mentioned exceeded by that sum the entire gross earnings received by the lessee from its own and the leased line, and, inasmuch as during this period $2,234,396.62 out of the gross earnings were paid on account of interest on bonds, being $986,304.86 more than the entire apparent deficit, the inference was attempted to be drawn that the deficits arose in consequence of the payment of interest on the bonds more than sufficient, if it had been so appropriated, to have paid the entire rental, including the arrears of rent. It was claimed that that statement established the fact sought to be proved, viz.: that gross earnings which should have been applied to the payment of rent had been diverted by the lessee to the payment of interest on the bonds. The Court said that the statement was deceptive, and by the analysis of the figures showed that this deficit was not properly chargeable to the fact that interest had been paid on the bonds.

Just such a claim is made by counsel in the case at bar (*Brief*, p. 36, etc.).

A similar statement has been put in evidence (*Record*, p. 143)-

An analysis of those figures and an examination of the testimony and exhibits, will show that there was a running account between the two companies, and that the indebtedness of the Texas Central Company is nothing more than an indebtedness for cash advances, and advances made by the actual mortgagor.

Again, the account on which this suit was brought runs back to 1880, nearly five years before the bill was filed. Courts, even when allowing a preference, always set a, limit of time. The reason is plain. It is not all floating debt that should be paid. Current expense accounts and ordinary debts for operation which are in arrears in the ordinary management of a business that cannot be done on a cash basis should be paid, but the Courts limit the time to that within which the company was accustomed to make such settlements.

In *Fosdick* vs. *Schall*, the order appointing the Receiver required payment of debts for labor, supplies, etc., incurred within three months before the appointment. In *Miltenburger* vs. *The Logansport Railroad Company*, such authority was limited to $10,000, accruing within ninety days, and in *The Union Trust Company* vs. *Souther*, the limitation was for the preceding six months. In *Burnham* vs. *Bowen*, there was but a single debt, which was contracted a short time before the receivership, and which would have been paid by the company, when due, but for the receivership. In *The Union Trust Company* vs. *Illinois Midland Company*, payments were limited to six months before the appointment of the Receiver. The usual limit is three months.

SECOND.

There is no question as to the jurisdiction.

The defendant in its assignments of error objects that the Trust Company was granted leave to file its bill as a cross-bill, and that such cross-bill was not dismissed for want of jurisdiction. We understand the practice of this Court, as shown in a multitude of cases, to be far from technical in considering the form of the pleadings that have been used in and accepted by the Court below. It would be, we presume, an extreme case which would justify this Court, in its own opinion, in refusing to do justice between parties, because a complainant had filed a cross-bill when an original bill would have been more proper. Were it not for the large issues involved in the decision of this cause, and for the fact that an eminent counsel considers the point sufficiently important to argue it at length, we should be inclined to pass at once to other considerations.

I.—The first objection made by the appellant's counsel affects the time when the cross-bill was filed. It is a well settled rule, he says, that the proper time for filing a cross-bill is at the time of putting in the answer, and before issue joined by filing of replication. We find no authority for such a statement. The citation does not sustain it. Of course it is quite usual for a defendant to file his cross-bill with his answer, but he may be permitted to do it at any time before decree, even as late as at the hearing itself.

2 Daniell's Ch. Pr. & Pl., 1550.
Foster's Fed. Pr., § 170.

II.—It is true that the Trust Company, in its answer, took formal objection to the bill by way of demurrer. But that objection was not sustained, and it could not be, for the bill filed by the Morgan Company was not demurrable. Its purpose was to foreclose an actual existing lien. The Morgan Company held the certificates representing the bonds to be issued under the general mortgage to the Metropolitan Trust Company, and therefore the bill showed facts authorizing the Court to take possession of the property.

III.—The counsel says that it must be admitted that our bill could not have been sustained as an original bill by reason of the citizenship of the parties. Nothing of the kind is admitted, but the express contrary is asserted.

If there is anything in the objection that we could not bring in a non-resident defendant to a cross-bill by publication, it is sufficient to say that we did not do so. All the defendants voluntarily appeared and answered (fols. 134, 181, 182, 183).

Treat this cross-bill as an original bill, and the jurisdiction is unquestionable. The Court had possession of the *res* by its Receiver, and jurisdiction of our bill followed, depending not on citizenship, but on the subject-matter of the litigation.

The suit having been commenced and the Court having appointed a Receiver, the subject-matter was in the hands of the Court for proper administration.

Practically Courts of Equity in such cases invite all parties interested to come forward and prove their claims in the cause so pending. This is done by cross-bill or intervening petition.

The Trust Company having been brought into Court by the original complainant's amended bill, filed an answer and cross-bill. It did not inject itself into the litigation.

This is one of those cases in which a cross-bill was needed to bring the whole matter in dispute properly before the Court. The priority of claims against the proceeds of the sale could only be settled in this way.

2 Daniels' Ch. Pl. and Pr., 1548, 1550.
Mit. and Ty. Pr. and Pl. in Eq., 178.

In such cases the Court may even direct a cross-bill to be filed in order to bring the rights of all the parties fully and properly before it.

Field vs. *Schieffelin*, 7 John, Ch., 252.
Patterson vs. *Hull*, 9 Cow., 747.
Armstrong vs. *Pratt*, 2 Wis., 299.

Even if the original bill had been dismissed, the cross-bill would have remained as if it had been filed as an original bill.

Lowenstein vs. *Glidewell*, 5 Dill., 325.

If the Court has jurisdiction over the *res* on filing of an original bill, it will take jurisdiction of bills not original and bills in the nature of original bills growing out of the first suit, without regard to the citizenship of the parties thereto.

Clark vs. *Matthewson*, 12 Pet., 164.
Jones vs. *Andrews*, 10 Wall., 327, 333.
Pacific R. R. of Missouri vs. *Missouri Pacific R. R. Co.*, 111 U. S., 505.
Freeman vs. *Howe*, 24 How., 450;
Minnesota Co. vs. *St. Paul Co.*, 2 Wall, 609;
Krippendorf vs. *Hyde*, 110 U. S., 276;
Dewey vs. *West Fremont Gas Coke Co.*, 123 U. S., 329;
Gumbel vs. *Pitkin*, 124 U. S., 31.

In *Minnesota Company* vs. *St. Paul Company* (2 Wall., 609), this Court said, through Mr. Justice Miller:

> "This property is still in the hands of the Receiver of the Court. If in the hands of the Receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that Court, without regard to the citizenship of the parties."

Again in *People's Bank* vs. *Calhoun*, 102 U. S., 256:

> "The jurisdiction of the Circuit Court of the United States does not here depend on the citizenship of the parties, but on the subject-matter of the litigation. That was in the actual possession of that Court when the State Court attempted to levy its writ of attachment on the property. It was for the Court having such possession to determine how far it would permit any other Court to interfere with that possession, and what effect it would give to the attempt of another Court to seize the property so under its control. * * *
>
> "The bank was attempting in the State Court to enforce by judicial sale a rival and conflicting lien to that of Calhoun and Opdyke, who were proceeding in the Federal Court to sell the same property under their lien. The latter Court had not only obtained jurisdiction of the question of lien prior to the initiation of the bank's

suit, but it had taken possession of the property by its Receiver. It had thus drawn to itself the subject-matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the road.

" These principles are not new in this Court. They will be found to be sustained by *Minnesota Company* vs. *St. Paul Company*, 2 Wall., 609 ; *Watson* vs. *Jones*, 13 *Id.*, 679 ; *Buck* vs. *Colbath*, 3 *Id.*, 334 ; and *Freeman* vs. *Howe*, 34 How., 450" (pp. 261, 262).

IV.—The appellant's counsel appears to think that it is very material to the rights of the bondholders in this suit that the trustee's attorney should have been absolutely correct in the technical forms of pleading, and that it would be fatal to those rights if it should now turn out that the attorney styled his pleading a cross-bill when he should have put it in the form of an original bill, or called it by some other name. As we have already suggested, we understand that matters like this are little considered in this Court.

It is immaterial whether the cross-bill be regarded as a cross-bill proper, an original bill in the nature of a cross-bill, or as an original bill.

Ragland vs. *Broadnax*, 29 Grat., 401.

In determining whether a bill is original and independent or ancillary to a matter already before the Court, the Courts of the United States are not confined to the line which in chancery pleading divides original bills from cross-bills and supplemental bills, but they may look to the essence of the matter and to principles which as regards parties the Federal Courts have adopted in reference to their jurisdiction.

Minnesota Co. vs. *St. Paul Co.*, 2 Wall., 632.

Freeman vs. *Howe*, 24 How., 450.

Schenck vs. *Peay*, 1 Woolw., 184.

By amended bill the Trust Company was made a party to a suit brought to enforce a lien by sale. It was brought into the litigation and called upon to assert its rights. It answered the amended and supplemental bill, setting up various defences thereto. It then filed its cross-bill, setting up its own lien, claiming priority, and praying for affirmative relief. Certainly this was a cross-bill brought against the same plaintiff in the same suit, "touching the matters in question in the original bill," its object being "to obtain full and complete relief as to the matters charged in the original bill." (See *Ayres* vs. *Carver*, 17 How., 708).

THIRD.

No request of bondholders was necessary.

The appellant's assignment of error in relation to that portion of the decree which directs a sale upon non-payment of the principal and interest within ten days, in the absence of any averment in the Trust Company's bill and of any evidence in support thereof of a request by holders of seventy-five per cent. in the amount of the bonds to foreclose the mortgage and sell the property, is supported by an ingenious argument founded upon the decision of this Court in the case of the *Chicago and Vincennes Railroad Company* vs. *Fosdick* (106 U.S., 47).

It will be noted that all that the appellant claims under this assignment is *that we could not foreclose for principal*. (*Appellant's Brief*, pp. 48, 56.) The interest would unquestionably be due, and this

Court would therefore send back the case to the Circuit Court with directions to enter a decree *nisi*, adjudging the amount due for interest, fixing a time within which defendant company must pay it, and ordering that if it were not paid within that time the mortgaged property should be sold ; and as it necessarily would have to be sold as an entirety, and as the railroad company admits its own insolvency, the decree would have to provide that in case of such sale the entire principal sum should be paid out of the proceeds. The error here assigned is rather one of form than of substance.

But there was no error. The *Chicago and Vincennes* case differs from the case at bar in most important particulars, which are not noted in the brief of the appellant's counsel. Our mortgages contain an express provision that nothing therein contained should be construed as interfering with the foreclosure of the mortgage in a Court of Equity (*Record*, fol. 55).

The fifth article of the *Chicago and Vincennes* mortgage provided in substance, that in case default should be made in the payment of any interest or of the principal of any of the bonds, without the consent of the holder, the company should, within six months thereafter, the same default still continuing, on demand of the trustees, surrender to them the possession of the road and the mortgaged property ; but it was provided that no such demand for possession should be made until they should be required to take possession by the holders of at least one-half of all the outstanding bonds. The sixth article of the mortgage provided that in case default should be made and continue as aforesaid, it should be lawful for the trustees, after entry and possession taken as above authorized, to sell the property in the manner specified. The eighth article provided that if default were made in the payment of any half year's interest on any of said bonds, and the coupon for such interest should have been presented, and such default should have continued six months after such demand, without the consent of the holder of such coupon or bond, then the principal of all of the bonds should be and become immediately due and payable, anything in such bonds to the contrary notwithstanding, and the trustees might so declare the same, and notify the party of the first part thereof, and, *upon the written request of the holders of a majority of the said bonds then outstanding*, should proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as the mortgage provided.

The original bill was filed February 27, 1875. The trustees under the mortgage alleged that there had been a default for more than six months after a demand for the payment of the coupons due October 1, 1873; that they had declared the principal due and notified the company thereof, and they prayed for decree for principal and interest, and for the foreclosure and sale. *No allegation was made as to any written request, as required by the mortgage.*

The Master reported that the company did not pay any of the interest falling due on October 1, 1873, or any subsequent instalments of interest, and that one of the coupons due October 1, 1873, was protested for such non-payment more than six months prior to the institution of the action or the service of the written notice of the trustees declaring the principal due, and that the whole amount of principal and interest was due. Exceptions were filed to the report and a decree was rendered confirming it. The decree recited the default, service of notice by the trustees, etc., and then found the amount due to be the whole of the principal sum and interest, and it ordered the amount so found due to be paid within twenty days, and in default thereof all the property, etc., of the mortgagor to be sold as an entirety.

Mr. Justice Matthews, in the opinion of this Court on appeal, said it was undeniable that the company was in default October 1, 1873, on some of the coupons, and that such default entitled the trustees to take possession under the terms of the Fifth Article (*supra*), and to sell under the power of sale as provided in the Sixth Article He then proceeds to affirm the proposition that independently of the provisions of these Articles, the trustees, or, on their failure so to do, any bondholder, on non-payment of any instalment of interest, could file a bill for the enforcement of the security. In such a case the amount due would be the amount due on the unpaid coupons. For this sum, whatever it might be, the plaintiff was entitled to a decree *nisi*, and if the sum were not paid as the decree might direct, the Court must then order a sale. If the case proceeded that far, the plaintiff would have a lien on the money paid into Court, not only for his overdue coupons but for his principal debt (p. 68). But it is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation ot the right of the mortgagee further to proceed, and a substantial error in that finding must on appeal vitiate all subsequent proceedings. The Court then say:

> "It becomes, then, of the first importance to ascertain whether the decree of foreclosure and sale in the present case found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was due" (p. 71).

It will be borne in mind that the foreclosure was based on the default occurring October 1, 1873.

The Judge then reviewed the evidence in order to determine whether any coupons falling due on that date were actually presented and payment thereof demanded and refused, and concludes as to this question of fact as follows:

> "There are some statements in the answers and in the testimony of some of the witnesses that coupons due October 1, 1873, were presented for payment and were not paid, but there is no proof of the fact as to any particular coupon identified for that purpose, and we have carefully searched the record in vain for any evidence whatever that any coupon not afterwards funded was presented and payment thereof refused. The Master himself does not report any such" (p. 73).

In the case at bar the proof of such presentation and default is undisputed (*Record*, fols. 357, 8).

> "It is true, that where a mortgage has been given to secure a debt payable in instalments, and a bill has been filed for foreclosure and sale, upon a default as to one, the decree may require payment of all instalments then due, though maturing since the institution of the suit; but that principle does not suffice to bring the case of the appellees within the meaning of the eighth article of the conditions of the mortgage, so as to justify the decree requiring payment of the principal of the debt, as presently due. For by the terms of that provision the entire debt does not become absolutely due, on the default of the company, continued for six months, without the consent of the holder, to pay an interest coupon; but only at the election of the trustees, as declared by them and notified to the mortgagor. And the forfeiture of the time of payment to be established in a given case must stand or fall upon the fact of such declaration and notice, as it may be justified or not by the circumstances existing when they were made. It cannot be supported by subsequent occurrences. It follows, therefore, that the claim in support of the finding that the whole debt had become due must rest exclusively upon the alleged default of Oct. 1, 1873, and that, as we have seen, is not sufficient" (p. 74).

The second assignment of error was also deemed to be well founded. No extract from this branch of the opinion can well be given; the whole of it should be read (pp. 76-79).

Relative to the provisions of the eighth article (see *supra*), the trustees contended that without the written request they had the sole right to act according to their discretion and upon their own motion in declaring the principal sum due and to foreclose, etc., and that this clause was merely to make the obligation of the trustee imperative instead of optional. The Court said, "We cannot agree to that construction of the provision," and after stating the reasons therefor ended with:

> "It is, therefore, our opinion that, even had the the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless, the foundation for proceeding to foreclose for that cause, and of the decree requiring payment of that amount, would fail, without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record."

We have deemed it best to insert pretty fully from the case, though it differs vitally from that at bar, and its conclusions cannot be held applicable.

The *Chicago and Vincennes* mortgage provided that if default should continue for six months after demand, the principal of all the bonds should become due, and the Trustee might declare the same and notify the Railroad Company, and on the request in writing of a majority of the bondholders proceed to *collect* both principal and interest by foreclosure and sale or otherwise. The Court in substance held that this provision was restrictive upon the right to proceed to collect principal and interest by foreclosure and sale by bill in equity. But the provisions of the Texas Central mortgage (fol. 50) are entirely different. If default in the payment of the interest continues for sixty days after demand, then the principal of all the bonds becomes immediately due; but the Trustee cannot take *possession and sell by advertisement* unless requested by seventy-five per cent. of the bondholders.

So far as the principal becoming due by the mere default and demand is concerned, the two mortgages are not unlike, but after that point they are totally different. The *Chicago and Vincennes* mortgage provides for three remedies, first, entry; second, sale after entry; third, collecting by foreclosure proceedings in Court; but the last remedy could only be resorted to *when seventy-five per cent. of the bondholders made written request to the trustees to proceed to collect both principal and interest.* Hence the trustees had no right to commence a foreclosure suit in the absence of such request.

The Texas Central mortgages gave two express remedies: first, entry; second, foreclosure by sale under a power. To authorize the former, a request by seventy-five per cent. of the bondholders was necessary, in addition to written notice to the mortgagor company. Likewise, the latter remedy could only be pursued upon a written request of seventy-five per cent. of the bondholders. The provisions in both of the Texas Central mortgages are identical.

The appellant's counsel says (*Brief*, p. 54), that the provision is express; that it is only upon the request of the bondholders that the trustee shall foreclose the mortgages and sell the property for the payment of the debt; that until such request the anticipated payment of the principal debt was not to be enforced; that the right to enforce the anticipated payment of the debt was to attach only when the bondholders requested the trustee to proceed to foreclose.

The mortgages by no means sustain this statement. It is unauthorized. The kind of foreclosure to which the provision applies is a foreclosure by advertisement without the aid of the Court. Moreover, as to such foreclosure the mortgages simply provide (fol. 50) that upon the request of the bondholders "it shall be the *duty* of the said Farmers' Loan and Trust Company" to foreclose. They do not limit the power of the Trustee to proceed in its option; and lest some such contention as that now advanced should be considered plausible, and in order to make it clear that these provisions do not apply to foreclosure by bill in equity, they expressly provide toward the end of the mortgages as follows:

> "*It is hereby further agreed that nothing herein contained shall be held or construed to prevent or interfere with the foreclosure of this instrument, the appointment of a Receiver, or any other act or proceeding appropriate in such cases* BY ANY COURT OF COMPETENT JURISDICTION."

The right to commence judicial proceedings is absolutely unrestricted either as to time or manner. The clause providing that it should be the duty of the Trustee, upon being requested by seventy-five per cent. of the bondholders, to foreclose the mortgage and sell the property at public auction to the highest bidder, is merely the usual power of sale, to be exercised without the aid of the Court. No written request is necessary to authorize the institution of a suit for foreclosure. The right to foreclose is inherent in a mortgage. A suit for that purpose may be brought immediately upon a default in the payment of either interest or principal. There must be absolute affirmative provisions to limit it or take it away The fact is of no moment that the mortgage contains provisions that the Trustee may on certain conditions enter into possession and sell, if specially requested so to do.

> *Jones on Corporate Bonds & Mortgages*, sec. 385, citing *Chicago & Vincennes R. R. Co. vs. Fosdick, supra;*
> *Mercantile Trust Co. vs. Missouri K. & T. Ry. Co.*, 36 Fed. Rep., 221;
> *Central Trust Co. vs. Texas & St. Louis Ry. Co.*, 23 Fed. Rep., 846.

The grounds for the distinction are stated in detail by Judge Brewer in the *Mercantile Trust Co. vs. M. K. & T. Ry. Co., supra.* In that case the second clause of the mortgage provided for entry by the trustee, but by its terms such entry could not be made until six months after default and demand of payment. The third article likewise authorized a sale by advertisement, and that power was equally limited. Then followed this paragraph:

"This provision is cumulative to the ordinary remedies by foreclosure in the Courts, and the trustee herein or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the bondholders of a majority in value of said bonds then unpaid shall,"—etc.

The contention was that the words "upon default being made as aforesaid," being in the last part of the article, referred back to the entire provision in the first part in respect to default and included both the happening and continuance of the default. The Court said:

"It (the last clause in Article III) opens with a distinct announcement that these special provisions in respect to entry and sale under a power are cumulative to the ordinary remedies by foreclosure; contemplating in its opening words a proceeding in a Court of Equity in case of default. Nor is it strange that there should be special limitations upon the two matters provided in articles 2 and 3 and none to the proceedings in a Court of Equity. An entry is a speedy remedy. It runs to the *corpus* of the property. It takes instant hold of it and takes it away from the mortgagor. The parties may well have contemplated that if there was a temporary default there should be no such speedy interference and summary seizure by the mortgagee. So a sale by advertisement—in this case an advertisement of eight weeks—is speedy and summary; and if, upon the happening of a temporary default, the trustee at the instance of a single coupon-holder should thus advertise and sell the property, it is obvious that great wrong might be done; and six months' delay is a very natural provision. But proceedings in a Court of Equity are not thus hasty. They are not within the control of any coupon-holder or any trustee. They stand advanced or delayed, as in the judgment of the Chancellor the best interests of the property require. * * *

"Inasmuch as these proceedings stand upon the discretion of a Court of Equity, it is not strange that the parties were willing to leave to the bondholders and coupon-holders an open door into such a Court. They left an open door into a Court of law, and there is at least equal chance, if not greater, that the freer motions of a Court of Equity will aford as full protection to the mortgagor."

In *Dow* vs. *Memphis & L. R. R. Co.* (20 Fed. Rep., 265), Caldwell, J., said:

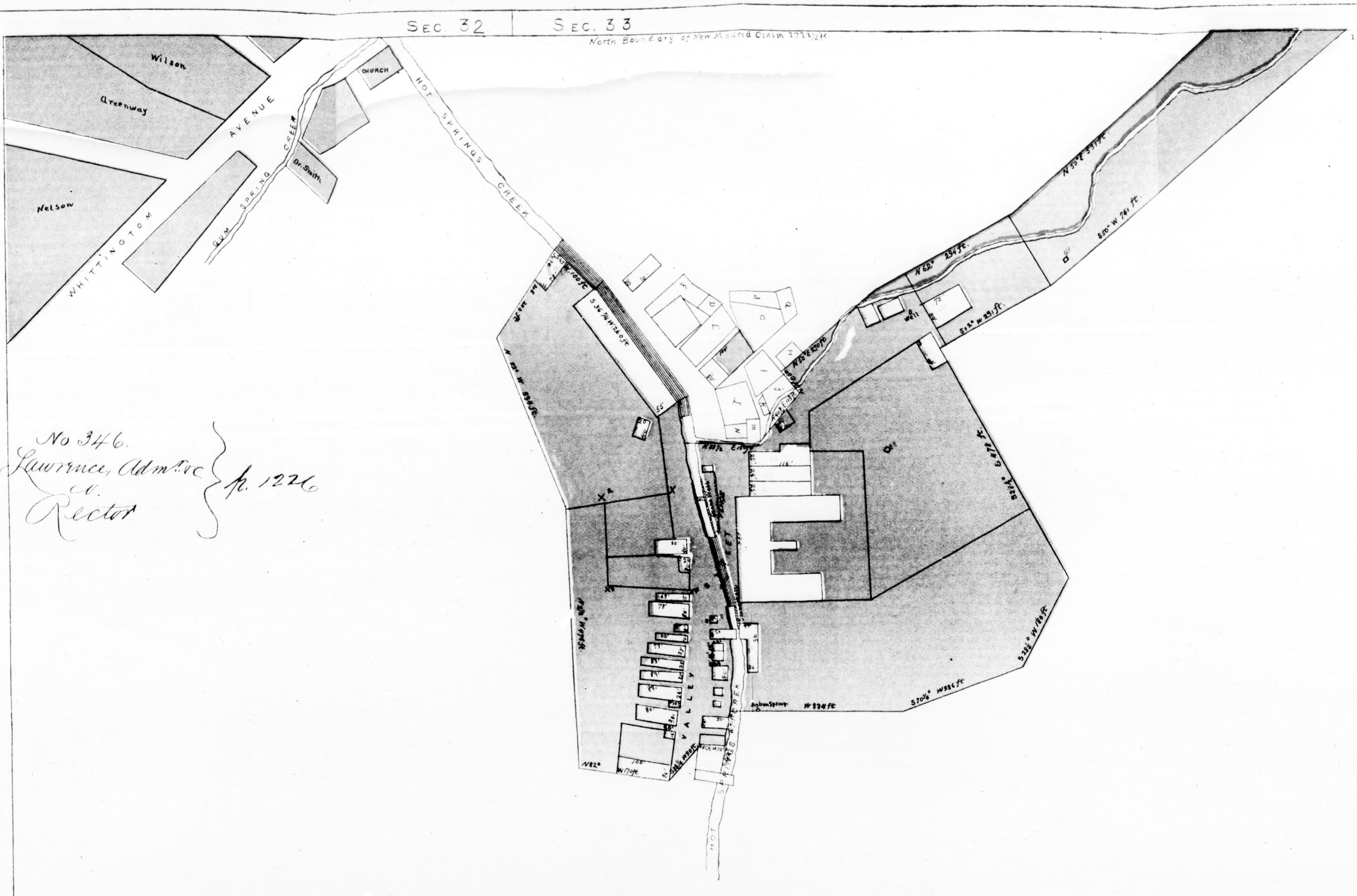
"The defendant's contention is that the fifth clause furnishes the rule by which the trustees are to obtain possession, and that it is exclusive of all other modes; and that as the bill does not allege that one-third in value of the bondholders have requested the trustees to take possession, it states no case. This clause contains a power of sale. Under it the trustees may sell the property upon four weeks' notice; and, upon the written request of one-third in interest of the holders of the bonds, it is made the imperative duty of the trustees to take possession for the purpose of selling. The power of sale is the principal subject deal with in this clause, and the possession there spoken of is an incident to the power of sale, and for the purpose of rendering that power effectual. When one-third in value of the bondholders come to a resolution to foreclose the mortgage by sale, they can make it the duty of the trustees to take possession of the property for that purpose, and to receive the income and earnings of the road from the time the possession is taken until the sale. * * *

"The trustees are not, therefore, to take possession of the property for the purpose of selling it, and thereby extinguishing the mortgage debt before its maturity, unless one-third of the bondholders request it. Although the provision is penal in its character, it operates alike for the protection of the bondholders and the company" (*Chicago, D. & V. R. Co.* vs. *Fosdick*, 106 U. S., 47 S. C., 1 Sup. Ct. Rep., 10), "so far as relates to a sale of the property by the trustees, and possession taken for that purpose. But as a remedy it is cumulative, and not exclusive of the rights and remedies given by the law to mortgagees, in case of default in payment of the mortgage debt according to the terms of the mortgage."

Proceedings that have been had before this Court during the pendency of this appeal, affecting this unfortunate railroad, have acquainted the Court with the fact that this long continued receivership has not only prevented the bondholders from obtaining possession of the property, but has hindered the proper development of a large section of Texas.

It is respectfully submitted that the decree of foreclosure and sale of April 12, 1887, should be in all respects affirmed

HERBERT B. TURNER,
Of Counsel for Farmers' Loan and Trust Company,
Appellee.



No 346.
Lawrence, Adm. &c
v.
Rector
} p. 1226

Plat

of the **Claim** of

Henry M. Rector

situated
on the Hot Springs Reservation of
Arkansas
1877

Scale 100ft to an Inch.

Copied by
Julius Polk.

OCCUPANT.

Out Building
Grand Central Hotel
Burned House
Peters House
Bath House
E.W. Rector
H.M. Rector Jr
J.W. Parker
Printing Office
Barber Shop
Dr Smith
Thad Taylor
Wegner
Dr. J. Finn
John Graham
E.W. Rector
Arlington Hall
Roys Barber Shop
La Clere House
Garnet & Greenway
Clary
Tent
Brooks & Ordway
Wakelin
Sauve
H.C. Howard
H.M. Clark & Co
Moore
Rector Bath House
Arlington Hotel
Burgauer
Brown
W.A. Moore
Bryan
Summers
Warehouse
Alington Stables

South Boundary of New Madrid Claim 2722½ ft.

Sec. 32 | Sec. 33